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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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JOANNE KOTLER, Individually and as  
Administratrix of the Estate of  
GEORGE P. KOTLER,  
Plaintiff,

v.

Civil Action  
No. 86-0810-S

THE AMERICAN TOBACCO COMPANY,  
PHILIP MORRIS, INC. and  
LIGGETT GROUP, INC.,  
Defendants. .  
----- x

BEFORE: Honorable Walter Jay Skinner

Held At:

John W. McCormack  
Post Office and Courthouse  
Boston, Massachusetts  
Wednesday, February 21, 1990  
9:45 a.m.

-----  
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Boston, Massachusetts 02111  
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## 1 APPEARANCES:

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4 and Garry V. Inge, Esq.

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7 For the Plaintiff.

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12 For American Brands.

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18 For American Tobacco Company.  
19  
20  
21  
22  
23  
24

I N D E XWitnesses:Direct Cross

Joanne G. Kotler

By Mr. Inge

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9

E X H I B I T S

Plaintiffs'

No.For Id. In Ev.

3 Frank Statement

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P R O C E E D I N G S

THE COURT: You wanted to see me about something?

MR. BEZANSON: May we, Your Honor.

(Conference at bench...

MR. BEZANSON: Yesterday Mr. Nissen said they had intended to introduce the Frank statement into evidence today, and I would like to object to that in view of the way the Frank statement was introduced to the jury by Mr. Inge in his opening, he characterized it as misleading, he said that they wanted George Kotler to believe it and he believed it. He also said to the jury that "you will be the ultimate judges whether this was a Frank statement or not."

This all addresses misrepresentation which is not a claim in this case, and to have it introduced into evidence would really perpetuate the prejudice and the impropriety of the way it was introduced to the jury.

THE COURT: Well, I think it may go to the general subject of environment.

MR. BEZANSON: Your Honor, to the extent

1 that it has any relevant or probative weight at all,  
2 which we say it does not, that has already come in  
3 through testimony of Mr. Leake and there will be  
4 testimony on videotape of Mr. Heimann this morning  
5 to the effect --

6 THE COURT: This was the thing that was  
7 published in 500 pages.

8 MR. SHEFFLER: Whenever Mr. Kotler was at  
9 see in the Mediterranean Ocean, Your Honor. There  
10 is absolutely no evidence whatsoever in this case  
11 that Mr. Kotler ever relied upon any publication in  
12 the '40s and '50s. It is devoid of evidence and  
13 that was the basis of your ruling, Judge.

14 THE COURT: Basis of what ruling?

15 MR. SHEFFLER: Advertisements and  
16 misrepresentations are out of this case.

17 THE COURT: I will not admit it on that  
18 basis.

19 MR. SHEFFLER: What relevance does it have?

20 THE COURT: I just indicated it to you.

21 MR. BEZANSON: Your Honor, to the extent  
22 that it pertains to the environment, as you said,  
23 that is already through testimony in a much less  
24 prejudicial way. When it comes in this way, it

1 carries with it a tremendous amount of prejudice.

2 THE COURT: I can't help it if your  
3 company's people put out published garbage.

4 MR. SHEFFLER: Your Honor --

5 THE COURT: If it's prejudicial to your  
6 company, you've got nobody but yourselves to blame.

7 MR. BEZANSON: Prejudice was the way in  
8 which it was described and the purpose for which it  
9 was offered by counsel.

10 THE COURT: No.

11 MR. LANE: I have one point, Your Honor.  
12 We tried always to obtain 48 hours' notice as to the  
13 order of witnesses, and in that connection, a number  
14 of different things have been discussed to us over  
15 the time about what was to happen today, and I've  
16 heard names like Hughes, I've heard names like  
17 Spitzer, and each time I do that I start getting  
18 ready for cross examination. Yesterday a suggestion  
19 was we might not have a day here at all today. That  
20 changed. Then we heard from them that it would be  
21 Robert Ghiozzi and a fellow named Bubba Coveney,  
22 then about seven or eight o'clock last night for the  
23 first time I heard it would be the principal  
24 Plaintiff herself, Joanne Kotler.

1 MR. BEZANSON: Which they represented to us  
2 before would not occur until Thursday.

3 MR. NISSEN: That's tomorrow.

4 MR. LANE: I don't know if they are going  
5 to finish with Joanne or not --

6 THE COURT: If you get to that point, I  
7 will defer cross examination of her until tomorrow.

8 MR. LANE: Thank you, Your Honor...

9 ...end of bench conference)

10 (Jury Enters)

11 THE COURT: Good morning. This morning we  
12 are going to have a little change in the procedure,  
13 in that you will be hearing the testimony of a  
14 witness out of the box that's in front of you there,  
15 a videotape deposition. Now, I've explained to you  
16 about depositions before, where the witness is  
17 examined and cross examined with the stenographer.  
18 In addition to the stenographer, there is very often  
19 in times a videotape technician, and the whole thing  
20 is recorded on videotape. This has the advantage of  
21 providing the jury with the picture of the witness  
22 and the tone of voice that he uses in his answers  
23 and the facial expressions and body English and so  
24 on that goes with the testimony, all of which are

1 very useful to you in determining their  
2 credibility.

3 The somewhat unusual aspect of this  
4 particular videotape is that the lawyers involved,  
5 the lawyers asking the questions are not the lawyers  
6 in this case. This was a videotape taken in another  
7 connection. So whatever you hear from the lawyers  
8 is not to be attributed to the lawyers that are  
9 appearing here. In any case, as I said to you at  
10 the outset, it's the answers that count and not the  
11 questions.

12 So with that we can go forward, I guess.  
13 We would do better with the lights out, wouldn't we?  
14 One problem with the lights out, it is harder to  
15 stay awake. So keep alert.

16  
17 (VIDEOTAPE DEPOSITION OF ROBERT K.  
18 HEIMANN PROCEEDS AS FOLLOWS):

19  
20 DIRECT EXAMINATION

21 BY MR. DON DAVIS:

22 Q. Mr. Heimann, would you state your full  
23 name.

24 A. Robert K. Heimann.

1 Q. What age are you, sir?

2 A. 68.

3 Q. And where do you reside?

4 A. [DELETED]

5 Q. What is your occupation, sir?

6 A. I'm retired.

7 Q. And you have given a deposition before,  
8 have you not?

9 A. Yes, sir.

10 Q. And, in fact, you testified in court for  
11 American Tobacco in the past?

12 A. Yes, I have.

13 Q. All right, sir. You understand that your  
14 deposition and your testimony today is just as  
15 though you were in court testifying before the judge  
16 and jury?

17 A. I do understand that.

18 Q. You have been designated as a witness by  
19 American Tobacco Company in response to a request  
20 that they produce a witness that's familiar with  
21 various aspects of the company, and I want to go  
22 over the information which you possess very briefly  
23 this morning. But first I'd like to ask you about  
24 your educational background.

1                   What year did you graduate from college?

2           A.     1948.

3           Q.     What year did you graduate from college?

4           A.     1948.

5           Q.     And what college did you go to, sir?

6           A.     Princeton.

7           Q.     Did you pursue your formal education beyond  
8 your initial college degree?

9           A.     Yes. I had an MA and a Ph.D. from NYU.

10          Q.     First of all, your Master's. What area was  
11 your Master's degree obtained in?

12          A.     It was an analysis of movie scripts.

13          Q.     What type of an analysis?

14          A.     Well, you'd call it, I suppose, sociology,  
15 because that was the department I was working in.

16          Q.     Did you write a thesis to obtain your  
17 Master's?

18          A.     Yes.

19          Q.     What was the name of your thesis?

20          A.     I can't remember the name of it.

21          Q.     It has been suggested to me, and I'll ask  
22 you, that it was entitled Themes Recurring in  
23 American Movies?

24          A.     That sounds about right.

1 Q. And what was the gist of your study?

2 A. The gist was an analysis of the way the  
3 crowd, the abstract crowd, the American populace was  
4 handled repetitively in various films.

5 Q. Now, you said you also obtained a Ph.D.  
6 That's a doctor in philosophy degree?

7 A. Yes, sir.

8 Q. What area was that degree obtained?

9 A. That was also in the field of sociology.

10 Q. What year?

11 A. '52.

12 Q. All right, sir. Did you write a doctoral  
13 thesis in order to obtain that degree?

14 A. I did.

15 Q. What was the subject of that thesis?

16 A. This was a multi-varied statistical  
17 analysis to test one of the postulates of Karl Marx  
18 with respect to the formation of antagonistic  
19 capitalist and labor groups.

20 Q. You're a friend of Karl Marx the Communist?

21 A. Yes.

22 Q. In what context did you study his works?

23 A. I just said what context. His postulate  
24 was that capitalist and labor groups were gradually

1 strengthening in a kind of a dialectic tension which  
2 would create to more and more a hostile classes, and  
3 that was tested by an analysis over a 30-year period  
4 of membership in trade associations on the one hand  
5 and labor union membership on the other hand.

6 Q. You stated you used a statistical  
7 analysis. What are you referring to?

8 A. Well, we correlated over this 30-year  
9 period these membership figures which I had gathered  
10 with a time factor and a measure of the strength of  
11 the economy year to year. I can't recall what that  
12 measure was.

13 Q. This was a statistical analysis?

14 A. Yes.

15 Q. Was it based upon the statistical analysis  
16 that you were able to do a dissertation and obtain  
17 your doctorate degree?

18 A. Yes.

19 Q. Did your college education in any way study  
20 or examine the relationship between smoking and  
21 health?

22 A. No.

23 Q. Did your Master's degree in any way study  
24 or examine the relationship between smoking and

1 health?

2 A. No.

3 Q. Did your doctoral degree in any way examine  
4 the relationship between smoking and health?

5 A. No.

6 Q. Would it be fair to say that during your  
7 formal education you did not study in any manner the  
8 relationship between smoking and health?

9 A. Yes.

10 Q. Whatever information you had on smoking and  
11 health when you got your degrees would be the same  
12 as any man on the street in all probability?

13 A. That's a fair statement.

14 Q. What year were you first employed by  
15 American Tobacco Company?

16 A. 1954.

17 Q. How old a man were you at that time?

18 A. Let's see, born in, 36.

19 Q. What was your first assigned position with  
20 American Tobacco?

21 A. Executive assistant in the president's  
22 office.

23 Q. Mr. Heimann, when you were first employed  
24 in 1954, would you very briefly describe what your

1 position was with the company?

2 A. As executive assistant, I was given  
3 assignments in the areas of stockholder relations,  
4 public relations, financial public relations.

5 Q. Sir, approximately for how many years were  
6 you in that position?

7 A. Oh, a half dozen years, plus or minus.

8 Q. That takes us up to about 1960, then, or  
9 somewhere in that time frame?

10 A. Somewhere in there.

11 Q. What was the next position you had with  
12 American Tobacco?

13 A. I was then promoted to assistant to the  
14 president.

15 Q. Did your duties change in any way?

16 A. Well, they did. I think I received more  
17 meaningful assignments gradually over a period of  
18 years in the same areas.

19 Q. What was your next assignment with American  
20 Tobacco?

21 A. The next change was '63 or '64, and I was  
22 then made vice-president/marketing.

23 Q. Would you describe now when you refer to  
24 vice-president of marketing?

1           A.    Well, in charge of the sales function, the  
2           advertising function, the market research function  
3           and partially in charge of new product development.

4           Q.    In terms of the advertising of your  
5           company's products, is that all of the brands that  
6           your company made?

7           A.    Yes.

8           Q.    Would that include Pall Mall cigarettes?

9           A.    It would.

10          Q.    What was your next position?

11          A.    About 1966 executive vice-president, which  
12          covers all of the operation of the company with the  
13          exception of manufacture and leaf.

14          Q.    Would that include marketing and public  
15          relations?

16          A.    Yes.

17          Q.    And what was your next position, then, with  
18          the company?

19          A.    Next was president and chief operating  
20          officer. I can't think of the year.

21          Q.    Would that be approximately '73?

22          A.    '73 I was made chief executive officer at  
23          the death of the prior CEO. But I think I was made  
24          president and chief operating officer, which is a

1 No. 2 position, in between somewhere.

2 Q. All right, sir. When you were made  
3 president and chief executive officer, was the  
4 company name at that point American Tobacco Company?

5 A. No. At that time we had taken the name  
6 American Brands and American Tobacco Company was a  
7 division within American Brands.

8 Q. Would you give me a very brief history,  
9 please, of the American Tobacco Company?

10 MR. EDMONSON: Would you clarify for the  
11 record, Mr. Heimann, when you were chief operating  
12 officer when you were president and CEO.

13 A. When I was president -- I do remember being  
14 made chief executive officer in 1973 on the death of  
15 my predecessor, Mr. Walker, and I said that prior to  
16 that time I think my title was changed from  
17 executive VP to president, but not chief executive  
18 officer. Does that clear it up?

19 MR. EDMONSON: You had two positions or  
20 rather it was not a combined position when you were  
21 president?

22 THE WITNESS: No. That is correct.

23 Q. Where were your offices throughout this  
24 period of time?

1 A. In New York City.

2 Q. And what age man were you then when you  
3 assumed the presidency of American Tobacco?

4 A. Well, let's see, 1973, less 18, that would  
5 make it 55, would it not.

6 Q. All right, sir. Could you give us, please,  
7 a very brief history of the American Tobacco  
8 Company?

9 A. Briefly, the origin of the company goes  
10 back to Washington Duke, a Durham man who grew and  
11 granulated tobacco in Durham, and his son, James  
12 Buchanan Duke, moved the business to New York in the  
13 1880s.

14 In the year 1890, I believe it was named  
15 American Tobacco Company and through company changes  
16 and reorganizations and so on it continued right on  
17 up through that point.

18 Q. The present name is American Tobacco  
19 Company which is a division of American Brands; is  
20 that it?

21 A. Since I left the company in 1980 the  
22 American Tobacco portion was reconstituted as a  
23 wholly-owned subsidiary of American Brands.

24 Q. What other type companies does American

1 Brands own besides American Tobacco Company?

2 A. Jim Jim Beam Bourbon, Sunshine Biscuits,  
3 Swingline Stapler manufacturer, Master Lock, a  
4 padlock manufacturer, Franklin Life Insurance, the  
5 Acushnet Company, which makes the Titlist golf ball,  
6 Wilson Jones, the office supply company. I may have  
7 skipped one here or there.

8 Q. All right, sir. Back in 1963 you gave a  
9 talk to some security analyst here in New York City,  
10 and you mentioned that as of 1962 the shareholders  
11 equity in American Tobacco was \$585 million. Do you  
12 recall that figure generally?

13 A. I don't recall the figure. I recall the  
14 talk.

15 Q. All right. If you need to refresh your  
16 memory, I will be happy to show you a copy of the  
17 document that I'm referring to. I will hand you a  
18 document entitled "Headline Hunting With  
19 Statistics," which was the name of your talk, I  
20 believe, and I will ask you to refer, please, to  
21 Page 15, Paragraph C under "Financial Situation."

22 Did I correctly state that at that time  
23 you reported the shareholders' equity in American  
24 Tobacco was \$585 million?

1 A. That's what this says.

2 Q. And based upon your information and belief,  
3 was that accurate at the time you made that  
4 statement?

5 A. Yes.

6 Q. And when you refer to shareholders equity,  
7 are you referring to the net amount of money that  
8 would be left after a company's assets are  
9 liquidated and debts are paid?

10 A. In theory, yes. It's the net worth of the  
11 company after subtracting from the assets long-term  
12 debt.

13 Q. Let's go back to 1954. You are aware, of  
14 course, that in 1950 and 1954 there were articles  
15 appearing in magazines and newspapers and in the  
16 Reader's Digest suggesting a link between smoking  
17 and lung cancer, were you not?

18 A. Yes.

19 Q. I want to talk to you just a minute about  
20 the position of American Tobacco Company. At the  
21 time you first went to work for American Tobacco  
22 Company, have they already taken a position that  
23 smoking, on smoking and health to the effect that  
24 cigarettes were not injurious to your health?

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1 A. Yes.

2 Q. Had they taken that position?

3 A. Yes.

4 Q. Is that a position that they maintained  
5 throughout your employment with American Tobacco?

6 A. Yes.

7 Q. All right. Would it be correct, then, from  
8 1954 until 1980 it was American Tabacco's position  
9 that cigarettes are not injurious to your health?

10 A. That is so.

11 Q. At the time that position was formulated in  
12 1954, based upon your information, who formulated  
13 that position for American Tobacco?

14 A. The formulator and spokesman was the chief  
15 executive officer of the company, Mr. Paul Hahn.

16 Q. I understand he was a lawyer?

17 A. He had been, yes.

18 Q. Do I understand he was a lawyer prior to  
19 being employed by American Tabacco Company in the  
20 same firm in whose offices we are this morning?

21 A. That is true.

22 Q. Was there any on other person that you know  
23 of involved with Mr. Hahn in formulating that  
24 position?

1           A.     Yes. I would answer your question in a  
2 broad way by saying that his position was based on  
3 the study of tobacco by our Richmond research  
4 laboratory, a study which began very early in the  
5 century.

6                     The lab was founded in 1911, and from 1920  
7 on engaged in an intensive study of the components  
8 of leaf tobacco and of tobacco smoke, and it was a  
9 very extensive library of scientific information  
10 gathered by the laboratory over those years on which  
11 Mr. Hahn's position was initially based.

12           Q.     Did a man named Alfred Boden also consult  
13 with Mr. Hahn about smoking and health issues?

14           A.     Yes.

15           Q.     Did he have a college education?

16           A.     No.

17           Q.     He was a high school graduate?

18           A.     I can't tell you exactly what education he  
19 had.

20           Q.     Would it be a correct statement that as far  
21 as you know the American Tobacco Company's official  
22 position was formulated by Mr. Hahn and Mr. Boden  
23 and spoken by Mr. Hahn?

24                     MR. MR. EDMONSON: Mr. Heimann, you don't

1 have to guess to that answer if you don't know how  
2 it was formulated.

3 A. Well, I'm certain in my own mind, counsel,  
4 that Mr. Hahn did most of the formulating, but you  
5 mentioned some others and I just hesitated because I  
6 didn't want to leave out Mr. Hamner, who is director  
7 of research for the company who is a very important  
8 figure in those deliberations.

9 Q. Mr. Hamner was a chemist; is that correct?

10 A. Yes.

11 Q. He was not a medical doctor?

12 A. No.

13 Q. In fact, in 1954 when you went to work for  
14 American, they had no medical doctors involved in  
15 smoking and health; is that correct, that worked for  
16 the company?

17 A. I think that is correct, yes.

18 Q. All right, sir. Were part of your duties  
19 in working for American to explain American's  
20 position on smoking and health on occasions to  
21 different groups?

22 A. Yes.

23 Q. Did you also sit in on meetings with Mr.  
24 Hahn and Mr. Boden and Mr. Hamner concerning smoking

1 and health issues?

2 A. Yes.

3 Q. Did you meet with personal relations  
4 agents, these PR people, to excuse these issues?

5 A. With our own public relations counsel. Is  
6 that what you are referring to?

7 Q. Yes.

8 A. Ivy Lee and T.J. Ross was in on some of  
9 those discussions, yes.

10 Q. Did you also meet with advertising people  
11 and discuss smoking and health issues?

12 A. No.

13 Q. Just your personal relations people?

14 A. Public relations people I think we are  
15 talking about, yes.

16 Q. Did you and Mr. Hahn or any other personnel  
17 in American Tobacco ever sit down and discuss what  
18 American Tobacco would do if the allegations that  
19 were being published that smoking caused lung cancer  
20 were true?

21 A. No.

22 Q. You never discussed the subject?

23 A. No.

24 Q. Did it ever occur in American Tobacco at

1 some point the conclusion would be established that  
2 smoking was hazardous to your health?

3 A. No.

4 Q. Did American Tobacco ever convene a group  
5 of doctors and get their opinion about the effects  
6 of smoking and health?

7 A. We never convened a group of doctors, no.

8 Q. Did you ever consult with the American  
9 Medical Association about these issues?

10 A. Indirectly through representatives of the  
11 industry which supported research by the AMA in this  
12 area.

13 Q. Okay. We will discuss those efforts in  
14 just a moment, but my question at this point is, did  
15 you or anyone directly with American Tobacco ever  
16 consult with the American Medical Association that  
17 you're aware of?

18 A. I did not. I can't answer for others in  
19 the company who may have consulted with  
20 representatives of the AMA.

21 Q. To your knowledge, did anyone at the  
22 president's level ever consult with any professional  
23 medical associations during the period of time that  
24 you were with American Tobacco to determine and ask

1       them to determine if there were health hazards  
2       associated with smoking?

3           A.     Not that I know of.

4           Q.     I want to refer you to what has been marked  
5       as Plaintiff's Exhibit No. 1, and if we can, Mr.  
6       Heimann, I will put that in front of you so that  
7       the -- excuse me, let counsel refer to that for a  
8       moment.

9                     I want to refer you now to Plaintiff's  
10       Exhibit No. 1, which I'm placing before you, Mr.  
11       Heimann, which is entitled "A Frank Statement to  
12       Cigarette Smokers," and I'll ask you, sir, is this  
13       an advertisement that was placed in The New York  
14       Times by your former boss, Mr. Hahn, and I believe  
15       the date was what, January 4, 1954; is that  
16       accurate?

17                    MR. EDMONSON:  Is the question did Mr. Hahn  
18       place that ad in the paper?

19           Q.     I probably misstated it if that's what I  
20       said.

21           A.     It was placed by the Tobacco Industry  
22       Research Committee which Mr. Hahn helped to organize  
23       and almost gave birth to himself, and it was carried  
24       in The New York Times, yes.

1 Q. All right, sir. This document shows Mr.  
2 Hahn as the president of American Tobacco when it  
3 was one of the originators of the Tobacco Industry  
4 Research Committee?

5 A. Yes.

6 Q. I have underlined in red a statement  
7 there. Would you read that statement, please, sir  
8 if the writing is not too small.

9 A. "We believe the products we make are not  
10 injurious to health."

11 Q. Thank you. I'm going to hand you what is  
12 marked as Plaintiff's Exhibit No. 2, which is a  
13 document entitled "Smoking and Health Report of the  
14 Advisory Committee of the Surgeon General, The  
15 Public Health Service."

16 You are familiar with that document, are  
17 you not, sir?

18 A. Yes.

19 Q. Were you aware that in 1957 a scientific  
20 study group was established by the National Cancer  
21 Institute, the National Heart Institute, the  
22 American Cancer Society and the American Heart  
23 Association to study the relationship of smoking and  
24 health?

1 A. Yes.

2 Q. Were you aware that that study appraised 16  
3 independent studies in five countries over a period  
4 of some 18 years?

5 A. I think I've already stated that while I  
6 remember the term "study group," when I was last  
7 asked about this, I said that I couldn't recall any  
8 of the details as to how they went about this study  
9 or what they said --

10 Q. All right.

11 A. -- and I think that still stands.

12 Q. All right, sir. Were you aware that that  
13 study group did conclude there was a relationship  
14 between excessive smoking and lung cancer?

15 A. I don't remember anything except the name  
16 of that group.

17 Q. All right. Did you ever meet Dr. Leroy  
18 Burney?

19 A. No.

20 Q. Do you know that in 1957 he was the Surgeon  
21 General of the United States?

22 A. I remember his name, yes.

23 Q. Did you see a statement which was published  
24 by Dr. Burney on July 12th of 1957 that stated, and

1 I'm going to quote, "The public Health Service feels  
2 that the weight of the evidence is increasingly  
3 pointed in one direction that excessive smoking is  
4 one of the causative factors in lung cancer"?

5 A. Well, I can't tell you that I remember that  
6 quote. I remember Mr. Burney and I think I recall  
7 that his position changed over a period of time.

8 Q. Do you recall at one time while you were  
9 with American Tobacco he did issue a statement that  
10 it was his belief that smoking was causally related  
11 to lung cancer?

12 A. He may have. He may have.

13 Q. To your knowledge, did American Tobacco  
14 convene any medical doctors to examine the validity  
15 of Dr. Burney's statement at any time?

16 A. Well, beginning in late 1953 with the  
17 establishment of the TIRC, which later became CTR,  
18 Council for Tobacco Research, one of the major  
19 efforts in that whole procedure was to put the  
20 question to responsible scientific authorities,  
21 medical authorities, who were equipped to make  
22 judgments on the validity of the claims against  
23 cigarettes and also to institute sound, objective  
24 research into the question and to disseminate the

1 findings of that research to the public.

2 Q. Okay. I want to ask you the question,  
3 though, did American Tobacco ever convene a group of  
4 doctors to examine the validity of Dr. Burney's  
5 statement?

6 A. Perhaps I did wander a little from your  
7 question. But I meant to say that questioning the  
8 validity of Dr. Burney's statement would then have  
9 been a function of the TIRC, not American Tobacco.

10 Q. Were you aware on November 28th of 1959 the  
11 Surgeon General Burney published an article in the  
12 Journal of the American Medical Association and  
13 stated "Cigarette smoking particularly is associated  
14 with an increased chance of developing lung cancer"?

15 A. Again, I can't vouch for the citation. I  
16 don't recall it specifically.

17 Q. All right. Let's talk just a minute now  
18 about the Tobacco Industry Research Committee. You  
19 stated that that was something that the president of  
20 American Tobacco, Mr. Hahn, gave birth to, I believe  
21 in your words, back in 1954?

22 A. (Witness nods).

23 Q. Did the Tobacco Industry Research Committee  
24 have a research lab?

1 A. No.

2 Q. Did they have any research facilities in  
3 place?

4 A. No, not that I ever heard.

5 Q. It was simply an association, was it not?

6 A. Well, it was an independent scientific  
7 body.

8 Q. Who were the members of it, if you know?

9 A. Well, I can give you a few names out of  
10 recollection. Julius Comro, McKeen Gattle.

11 Q. Can you identify those companies they  
12 represented as you give their names?

13 A. These are scientists, reknowned scientists  
14 who have no connection whatsoever with any tobacco  
15 company or tobacco commercial interest, and they  
16 served at the request of the tobacco industry that  
17 members who were cited in that advertisement to  
18 support sound, objective research in the areas of  
19 smoking and health wherever worthy research could be  
20 supported.

21 Q. All right. They acted as an advisory board  
22 to review grant applications and approve grants to  
23 people out in different areas doing research?

24 A. Exactly.

1 Q. All right, sir.

2 A. Exactly.

3 Q. Now, you also, if I understand correctly,  
4 and by you, I mean your company --

5 MR. BEZANSON: Objection.

6 THE COURT: Where are you now?

7 MR. BEZANSON: Page 37, Line 4.

8 THE COURT: My note says that Page 37,  
9 Lines 4 to 25 are to go out.

10 MR. BEZANSON: I believe we were to pick up  
11 again on Page 40, Line 2.

12 THE COURT: 38 is out, 39 is out. Can you  
13 make that change now? Can you fast forward where it  
14 says "It was in July of 1962 Surgeon General Luther  
15 Terry," and so forth.

16 MS. LUMSDEN: Can we turn the volume down?

17 THE COURT: Whatever you have to do to get  
18 through this, I don't know. I don't know how many  
19 lip readers we have on the jury.

20 THE COURT: The next thing we should hear  
21 is "It was in July of 1962 that Surgeon General  
22 Luther Terry," and so forth.

23 (Discussion off the record)

24 Q. And it was in July 1962 Surgeon General

1 Luther Terry met with several medical associations  
2 and representatives from the Tobacco Institute to  
3 select an advisory committee to the Surgeon General  
4 to study smoking in health; is that correct?

5 A. I can't advise you of the date, but in that  
6 time frame, that's true, yes.

7 Q. Results of that advisory committee work  
8 became the Surgeon General's report on smoking and  
9 health in 1964; is that correct?

10 A. I believe so.

11 Q. And that's the document you have before you  
12 that's marked as Exhibit 2?

13 A. Yes.

14 Q. You were aware that the committee that was  
15 changed to be the advisory committee to the Surgeon  
16 General was selected by a group of medical  
17 associations and the tobacco industry submitting  
18 names for considerations?

19 A. I can't tell you exactly what the procedure  
20 was. My memory on that is very vague.

21 Q. Do you remember that the Tobacco Institute  
22 had a veto power and could refuse to allow anyone to  
23 sit?

24 A. That may have been so, but that is long

1 removed in time. I can't be certain.

2 Q. You do know that two years later in 1964  
3 when that report came out, the Surgeon General's  
4 report stated that "cigarette smoking is causally  
5 related to lung cancer in men," do you not?

6 A. Without vouching for the exact words,  
7 that's the substance of what he concluded.

8 Q. As a result of that statement, did American  
9 Tobacco voluntarily issue any writings to cigarette  
10 smokers?

11 A. No.

12 Q. As a result of that study, you mentioned  
13 earlier that indirectly American Tobacco had  
14 consulted with the AMA in some research that was  
15 done after the Surgeon General's report came out; is  
16 that correct?

17 A. The AMA was to perform research as a  
18 grantee in this area, and we supported that effort.

19 Q. All right. I'm going to show you a book --

20 MR. BEZANSON: Objection.

21 THE COURT: Hold it.

22 MR. BEZANSON: It is supposed to pick up  
23 now on Page 46, Line 11, Your Honor.

24 THE COURT: That is true. Page 46, Line

1 11. The question is "Do you know what a carcinogen  
2 is." That's the next question.

3 MS. LUMSDEN: It's just one question, Your  
4 Honor, and we've agreed that that question is all  
5 right.

6 THE COURT: All right.

7 Q. Have you ever had occasion to look at the  
8 American Medical Association's report which was  
9 issued at the end of that 12-year study?

10 A. I'm sure I've seen this at one point or  
11 another.

12 Q. Do you know what a carcinogen is?

13 A. I'm not so sure anyone does exactly, but I  
14 know in what context the word is used. Usually it's  
15 used in connection with laboratory animal studies to  
16 denote a substance which is supposed to cause  
17 cancer.

18 Q. All right. Let me go back just a moment to  
19 a statement you made earlier about the formation of  
20 the Tobacco Industry Research Committee in 1954.  
21 That's what became the Council for Tobacco Research;  
22 is that correct?

23 A. That is correct.

24 Q. And it still had no research facilities,

1 did it?

2 A. It did not.

3 Q. It didn't have any laboratory or any  
4 facilities --

5 A. No.

6 Q. -- that studied itself smoking and health?

7 A. No.

8 Q. It was simply an office that had an  
9 advisory group of scientists and doctors that  
10 approved grants when grant applications were made  
11 and disbursed money for use in financing those  
12 studies?

13 A. That is correct.

14 Q. I want to show you what is marked as  
15 Plaintiff's Exhibit No. 5. It's an article entitled  
16 "Addictive Aspects In Heavy Cigarette Smoking."

17 Have you ever had occasion to see that  
18 article, to your knowledge?

19 MR. BEZANSON: Would you like to take a  
20 moment to read the article, Mr. Heimann?

21 Q. Perhaps that's an unfair question, because  
22 I'm certain that it's difficult to remember every  
23 article. But does that article stand out, I guess I  
24 should ask, as one that you may have seen in the

1 past?

2 A. Well, it doesn't.

3 Q. Was that article and that research  
4 sponsored, in part, by the Council for Tobacco  
5 Research?

6 A. According to the marking in red here, it  
7 says "this work was supported in part by grants from  
8 the American Cancer Society and the Tobacco Industry  
9 Research Committee."

10 Q. The Tobacco Industry Research Committee is  
11 the same committee which Mr. Hahn initially gave  
12 birth to; is that correct?

13 A. That's the same one, yes.

14 Q. Would you turn to the last page where the  
15 conclusions are stated on that report, and I had  
16 marked in red. Would you read, please, the  
17 conclusion that is marked in red.

18 A. The conclusion states: "Every cigarette  
19 smokers thus appear to be true addicts showing not  
20 only social habituation but mild physiologic  
21 withdrawal effects."

22 Q. According to that study, then, which was in  
23 1962, in part, by the Tobacco Research Committee,  
24 heavy smokers appeared to be true addicts; is that

i correct?

2 MR. EDMONSON: I would object. The article  
3 speaks for itself.

4 Q. Does the article state that, Mr. Heimann?

5 MR. EDMONSON: He has already read in the  
6 record what the article says.

7 Q. Were you aware that in 1962 research was  
8 funded, in part, by the Tobacco Research Committee  
9 had concluded that cigarettes were addictive?

10           A.    I was aware that the claim had been made in  
11 various quarters.

12 Q. Were you aware that it had been made as a  
13 result of studies that have been funded, in part, by  
14 the Tobacco Research Committee?

15           A.     I can't say that I was aware of that nuance  
16     at that time.

17 Q. To your knowledge, has American Tobacco  
18 Company ever done a study on the addictive nature of  
19 nicotine?

20 A. On the addictive nature of nicotine? I  
21 don't believe so.

22 Q. To your knowledge, did American Tobacco  
23 Company issue any warnings to smokers in 1962 that  
24 there was some research showing that cigarette

1 smoking was addictive?

2 A. No.

3 Q. Let's turn, then, to the Council for  
4 Tobacco Research reports back when you were  
5 president --

6 MR. BEZANSON: Objection, Your Honor.

7 THE COURT: You're on Page 50, Line 5?  
8 Line 5 on Page 50, from there we go to Line 13 on  
9 Page 59.

10 MR. BEZANSON: Yes, sir. 13 to 18 you get  
11 on Page 59 then we go to Page 63.

12 Q. Did you ever address what action your  
13 company would take if a study funded by the tobacco  
14 industry found a relationship between smoking and  
15 lung cancer?

16 A. No.

17 Q. If I have understood the documents that I  
18 have looked at concerning the advertising of Pall  
19 Mall, in 1953 it was the fourth largest selling  
20 cigarette in the United States, approximately 48  
21 billion; would that be approximately correct?

22 A. It sounds reasonable.

23 Q. And in 1954 it moved up to the third  
24 largest selling cigarette to approximately 52

1 billion?

2 A. Yes.

3 Q. In 1960 it became the No. 1 selling  
4 cigarette in the United States?

5 A. That sounds about right.

6 Q. And in 1961, Pall Malls actually, while it  
7 was the number one cigarette, sold 4.7 billion more  
8 cigarettes than the cigarette in second place?

9 A. I can't vouch for the figure at this remove  
10 in time, but something like that is certainly true.

11 Q. Was there a direct relationship --

12 MR. BEZANSON: Your Honor, I object. This  
13 part was excluded.

14 THE COURT: Where are we now?

15 MR. BEZANSON: Page 63, Line 23, and I  
16 believe we are to pick up again on 68, Line 5.

17 THE COURT: Page 68, Line 5 is the next  
18 spot.

19 MS. LUMSDEN: I think what happened the  
20 answer was excluded but the question got in, Your  
21 Honor.

22 THE COURT: No problem with what's already  
23 come in. I think the bottom of Page 63 comes in,  
24 though.

1 MS. LUMSDEN: That's where we are, Your  
2 Honor. Then all the rest is out.

3 THE COURT: The bottom of Page 63 and the  
4 first two lines of Page 64.

5 MS. LUMSDEN: Right. So that's where we  
6 were, Your Honor. We can go back to that question?

7 THE COURT: Yes.

8 Q. Was there a direct relationship between the  
9 amount of money you spent on Pall Mall advertising  
10 and the promotion of it with the total sales of the  
11 product?

12 MR. BEZANSON: The answer was missing.

13 THE COURT: The answer was no. Get this?

14 Q. Does advertising play a role in a person's  
15 selection of a cigarette?

16 A. We hope so when we advertise. It's  
17 difficult to confirm this, but we do make the  
18 effort, and I think it's fair to assume that the  
19 expenditure of large funds for advertising does give  
20 status to a brand, and therefore, influences some  
21 people to select that brand.

22 Q. Is one of the objectives of advertising for  
23 cigarettes simply to put your advertising best foot  
24 forward and hope it will serve all purposes?

1 A. Yes.

2 Q. It will attract new smokers and keep your  
3 loyal ones?

4 A. Exactly.

5 Q. Did your company contract out with anybody  
6 to prepare studies on an annual basis about Pall  
7 Mall cigarettes?

8 A. We didn't contract. The agency for Pall  
9 Mall, SSC&B, conducted a very thorough survey of the  
10 domestic market every two years.

11 Q. What type of information were they trying  
12 to obtain?

13 A. Demographic information about the users of  
14 our brand versus other brands, what people thought  
15 of the cigarette, of the package, what they  
16 remembered from the advertising and so on.

17 Q. The purpose of this, I take it, would be to  
18 refine your advertising to increase its  
19 effectiveness?

20 A. Well, even broader than that. To get a  
21 better knowledge of the cigarette's standing and the  
22 cigarette's place in the scheme of things, which  
23 would be useful for the sales department as well.

24 Q. Do I understand that one of your purposes

20 Q. To determine the effectiveness of an  
21 advertisement on a consumer, the ad has to be  
22 considered in light of competing ads; is that  
23 correct? You don't advertise in a vacuum in this  
24 society, do you?

1           A.    No.   But why I hesitate is that you try to  
2           make your ad unique and different from the other  
3           fellow's ad --

4           Q.    Exactly.

5           A.    -- which doesn't exactly comport with what  
6           you just stated that you have to do what you do in  
7           the light of what the other person does.  You try to  
8           make yourself different from the other person, not  
9           imitate.

10          Q.    Let's go at it this way.  The reason you  
11          advertise is because other people advertise?  You  
12          have to advertise to sell your product, don't you?

13          A.    I think that's true, yes.

14          Q.    And in order to determine if your  
15          advertisement is going to lure consumers to buy your  
16          product, you have to consider that in light of other  
17          advertisements are advertising the same kind of  
18          products, do you not?

19          A.    Well, yes, I will agree to that.

20          Q.    The point simply being that no one  
21          advertisement in our society, whether it be  
22          concerning cars or cigarettes, can be considered in  
23          a vacuum unto itself, it has to be considered with  
24          the advertising of the industry; is that correct?

1 A. That's correct.

2 Q. Is it also correct that there is a referred  
3 effect to advertising, and I understand you have had  
4 some advertising courses, and if I understand what  
5 referred effect means, Mr. Heimann smokes Pall  
6 Malls, I like Mr. Heimann, but I like somebody who  
7 smokes Pall Malls. Is that a recognized effect of  
8 advertising?

9 A. I hope that that would be an effect when I  
10 smoke Pall Mall. Word of mouth you could say is in  
11 the same ball park. That is apart from advertising,  
12 which is what I think what you're saying to me, is  
13 that the type of people who use a specific product  
14 are sometimes in themselves advertisements for that  
15 product.

16 Q. I'm just trying to develop, there is an  
17 effect of advertising that goes beyond the effect of  
18 the person who actually sees the advertising ads?

19 A. Yes, I would agree to that, certainly.

20 Q. Throughout your tenure with American, it  
21 was not only American's position but your position  
22 that cigarettes weren't injurious to health; is that  
23 accurate?

24 A. Through my tenure?

1 Q. Yes.

2 A. Yes, that is so.

3 Q. Is that something that American Tobacco  
4 wanted the public to believe; is that correct?

5 A. Yes.

6 Q. That's a statement that American Tobacco  
7 takes great reliance on?

8 A. We issued that statement, yes.

9 Q. As far as you're concerned, a person is  
10 justified and reliable of that statement?

11 A. Yes.

12 Q. No reason you know of why the public  
13 couldn't accept your company's position, is there?

14 A. Well, in the area of scientific integrity,  
15 I know of no reason why they should not accept our  
16 position. I know that it is a practical matter that  
17 with a great deal of material being issued by  
18 scientists of one persuasion or another, it's rather  
19 difficult to get them to even know our position.

20 Q. The public who smokes your company's  
21 cigarettes they are doing exactly what you want them  
22 to do, though, correct?

23 A. That's what we would like them to do, to  
24 smoke our brands.

1 Q. You want them to buy your cigarettes and  
2 you want them to smoke every cigarette in the pack  
3 and you want them to buy another pack, don't you?

4 A. Yes.

5 Q. As far as you're concerned, a person can  
6 smoke one pack, two packs, however many packs he  
7 wants to; is that accurate?

8 A. Well, it's nothing that we prescribe or  
9 suggest or wish for.

10 Q. But that's your opinion?

11 A. Well, what people want to do is make their  
12 own decision. It's not our decision. We try to  
13 keep our product clean, good tasting, a good leaf,  
14 well packaged, preserved and fresh, and in the best  
15 possible condition to produce pleasure on the part  
16 of our customers.

17 Q. As far as you're concerned, though,  
18 American Tobacco is concerned, you know of no reason  
19 why they shouldn't smoke as much as they want to  
20 each and every day of their life; is that correct?

21 A. We never got into that subject of how much  
22 anybody should smoke.

23 Q. You would never fault a person for smoking,  
24 would you?

1 MR. EDMONSON: I think that question is a  
2 little broad. I would object to the form of the  
3 question.

4 Q. Would you blame a person for smoking two  
5 packs a day?

6 A. No.

7 Q. You wouldn't fault him for smoking one pack  
8 or two packs, would you?

9 A. I don't think so.

10 Q. You're aware of a publication called  
11 Reader's Digest, are you not?

12 A. Yes.

13 Q. I guess it has been around longer than you  
14 and I have?

15 A. Possibly.

16 Q. Has that publication historically published  
17 articles identifying --

18 MR. BEZANSON: Your Honor, objection.

19 THE COURT: I think we are getting into  
20 something that was excluded here. We go to 89, 9  
21 and according to my note we are supposed to go to  
22 94, Line 8.

23 MR. BEZANSON: Yes, Your Honor. Actually,  
24 94, Line 9, "Did your company have a procedure."

1 MR. BEZANSON: Yes. There is an  
2 intervening segment there, Your Honor, which is Page  
3 9 one, Line 6 through 15.

4 THE COURT: That's right. Page 91. That  
5 was the business about the Reader's Digest, that's  
6 what we were just about to hear.

7 MR. BEZANSON: We were just about to get  
8 into that, Your Honor, but I think there was some  
9 preliminary matter.

10 THE COURT: No, you are all right to that  
11 point. I don't see any objection noted to those  
12 lines. Pick it up where you were to the Reader's  
13 Digest.

14 MR. BEZANSON: Commencing on 91, Line 6,  
15 right?

16 THE COURT: Yes. Through 91, Line 15.

17 Q. I guess it has been around longer than you  
18 and I have?

19 A. Possibly.

20 Q. Has that publication historically published  
21 articles, medical articles identifying associations  
22 with cigarettes and health hazards?

23 A. They published quite a few of them, yes.

24 Q. Did you or any other person for American

1 Tobacco ever approach the editors or publishers of  
2 Reader's Digest concerning their policy about  
3 publishing medical articles on smoking and health?

4 A. I never did. I can't say that no one from  
5 the company or representing the company didn't or  
6 ever did, I should say. Certainly we were very much  
7 aware of those articles.

8 Q. Did your company have a procedure whereby  
9 they monitored health and medical articles in  
10 national magazines, such as time or Newsweek?

11 A. We try to monitor everything that had to do  
12 with smoking and health. That's what you are  
13 talking about.

14 Q. That is not a warning that is voluntarily  
15 placed there by American Tobacco, is it?

16 A. No. It is not.

17 Q. Would you put that warning there if  
18 Congress didn't require it?

19 A. No.

20 Q. You don't think they harm smokers so there  
21 is no reason to put any warning on them, do you?

22 A. We believe our product is not injurious to  
23 health.

24 Q. As far as you are concerned, is the Surgeon

1 General simply wrong in concluding that cigarette  
2 smoking causes lung cancer?

3 A. I would use the term misguided.

4 Q. If it's misguided, I take it, your opinion  
5 is he is wrong?

6 A. I was simply trying to be polite about it.

7 Q. But not being polite about it, he is wrong?

8 A. Dead wrong.

9 Q. Congress is wrong in requiring these  
10 warnings, correct?

11 A. We do not think they are justified.

12 Q. So they are wrong?

13 A. They are wrong.

14 Q. Have you ever heard of the American Health  
15 Organization?

16 A. Yes.

17 Q. Canadian Ministry of National Health and  
18 and Welfare?

19 A. Yes.

20 Q. American Medical Association?

21 A. Yes.

22 Q. American Lung Association?

23 A. Yes.

24 Q. American Heart Association?

1 A. Yes.

2 Q. American Cancer Society?

3 A. Yes.

4 Q. American College of Chest Physicians?

5 A. Yes.

6 Q. American College for Thoracic Surgery?

7 A. Yes.

8 Q. American Public Health Association?

9 A. Yes.

10 Q. U.S. Veterans Administration?

11 A. Yes.

12 Q. British Ministry of Health?

13 A. Yes.

14 Q. Canadian Cancer Society?

15 A. No.

16 Q. Canadian Heart Association?

17 A. No.

18 Q. Of those that you recognized, did you know  
19 that each one of those health organizations has  
20 concluded cigarette smoking is hazardous to your  
21 health?

22 A. Well, without tying me to each and every  
23 one, I'm familiar with the fact that most of them  
24 have denounced cigarettes at one time or another.

1 Q. In your opinion, are all of these  
2 organizations wrong?

3 A. Yes.

4 Q. Do you know of a single organization or  
5 public health service that has concluded in the past  
6 25 years that cigarette smoking is not hazardous to  
7 your health?

8 A. I can't name any.

9 Q. In fact, the only organization that says  
10 cigarette smoking is not hazardous is the tobacco  
11 industry, isn't it?

12 A. I wouldn't go that far. There are many  
13 eminent scientists who pointed out very early on the  
14 fallacious nature of the evidence that was  
15 introduced. Not just in 1954, but in the decade  
16 sense repeated over and over again in the Surgeon  
17 General's report, and when I say eminent scientist,  
18 I'm talking about, let's say, No. 1, the No. 1  
19 biostatistician in the United States, and No. 2, the  
20 father of statistics in the United Kingdom, Sir  
21 Arnold Fisher. So if you go right to the top to  
22 people who know, they will tell you that this whole  
23 statistical machine is a reprehensible propaganda  
24 campaign, that it's based on spurious statistics and

1 that are socially irresponsible.

2 Q. I'm going to object as your answer is not  
3 responsive.

4 I would like to ask you, sir, do you know  
5 of any professional organization, other than the  
6 Tobacco Institute that has concluded cigarette  
7 smoking is not hazardous to your health?

8 MR. EDMONSON: I think he has already  
9 answered that.

10 Q. What is the name of that organization?  
11 Tell me the name of any organization that you're  
12 aware of that has concluded that smoking is not  
13 hazardous to your health?

14 A. I thought I indicated to you that I could  
15 think of no organization.

16 Q. Except the Tobacco Institute?

17 MR. EDMONSON: I think he has already  
18 answered the question and we will object to you  
19 arguing with the witness.

20 Q. Can you refer me to any medical study that  
21 has been performed in the last 15 years that has  
22 concluded that smoking does not cause lung cancer?

23 A. It's pretty hard to prove a negative in  
24 science or in law or in any other department of

1 human behavior. I don't think such proof exists.

2 Q. I will refer you to the medical study that  
3 has been performed in the last 15 years that  
4 concluded that smoking was not associated with lung  
5 cancer?

6 A. There have been some. I can't give you  
7 chapter and verse the last 15 years.

8 Q. Has American Tobacco, to your knowledge,  
9 ever hired a group of doctors to do any  
10 epidemiological studies to determine if there is any  
11 health hazards in smoking?

12 A. No, I don't believe we have.

13 Q. Has American Tobacco ever set up a lab to  
14 study the possible health effects from smoking?

15 A. Set up a lab? We have a lab, but it's not  
16 for that purpose.

17 Q. Have you ever had a research facility set  
18 up at American Tobacco to study the differences in  
19 health of smokers versus non-smokers?

20 A. No.

21 Q. Have you ever done any clinical studies on  
22 the health consequences of smokers as compared to  
23 non-smokers?

24 A. No.

1 Q. Has American Tobacco ever conducted any  
2 study to determine how the medical professions in  
3 the United States perceive hazards associated with  
4 smoking?

5 A. There have been some studies. I think I  
6 mentioned in my earlier testimony in Texas that the  
7 Gallup organization did a series of such studies.

8 Q. Did they conclude that the American public  
9 did not perceive smoking as being hazardous?

10 A. No. They concluded that a certain  
11 percentage of people were inclined to credit the  
12 anti-cigarette claims and a certain percentage  
13 didn't know and a certain percentage rejected the  
14 anti-cigarette claims, but I can't tell you from  
15 memory just what the percentages were.

16 Q. Do you think a medical doctor would be more  
17 qualified than you are to determine that cigarette  
18 smoking is hazardous to a person's health?

19 A. Well, let me say, without being boastful,  
20 that the real nub of this question is the proper use  
21 of statistics. That's how this whole megillah  
22 arose, and that most physicians have little or no  
23 knowledge of statistical nuances and would be easily  
24 taken in, misguided by the improper use of

1 statistics.

2 Q. Is it your opinion that you are more  
3 qualified than a medical doctor?

4 A. In that area, yes.

5 Q. Let me make sure I have got the question  
6 straight. It's your opinion that you are more  
7 qualified than a medical doctor to determine if  
8 cigarette smoking is hazardous to your health?

9 A. To determine that the statistics that  
10 allege such causation are valid or not.

11 Q. Do you think the Surgeon General of the  
12 United States is more qualified with his resources  
13 than you are to determine if cigarette smoking is  
14 hazardous to your health?

15 A. Frankly, no.

16 Q. Is it correct you disagreed with every  
17 study that has ever been done that has concluded  
18 cigarette smoking is hazardous to your health?

19 A. I can't claim to have read every study that  
20 has been done.

21 Q. Every study that you've read, do you  
22 disagree with everyone that cigarette smoking is  
23 hazardous to your health?

24 A. I think so, yes.

1 Q. There has been a tremendous amount of  
2 research on the area of smoking and health in the  
3 past 30 years, 30,000 studies, and I'm not saying  
4 that's accurate but there is a tremendous amount,  
5 correct?

6 A. Correct.

7 (END OF VIDEOTAPED TESTIMONY  
8 OF ROBERT K. HEIMANN)

9 THE COURT: Is that it?

10 MS. LUMSDEN: That's it, Your Honor.

11 THE COURT: Are we going to proceed with  
12 the witness after the break?

13 MR. NISSEN: We may do a little reading  
14 from Mr. Leake, Your Honor, and then Mrs. Kotler.

15 (Jury Exits)

16 (Recess)

17 (Jury Enters)

18 THE COURT: Now, before we start, I should  
19 call to your attention a matter concerning which I  
20 am going to take the judicial notice, and it relates  
21 somewhat to the videotape deposition which you have  
22 seen. Rather than have a lot of discussion,  
23 testimony and so forth about advertising in the  
24 cigarette industry, and because of the complications

1 with respect to that, I'm going to take judicial  
2 notice of a fact, and under the rules that becomes a  
3 fact in the case which you can accept as a fact  
4 which you can use in making your determination about  
5 the merits of the case.

6 The purpose of the consideration of  
7 advertising is not to indicate there was anything in  
8 the matter or that it was improper advertising, but  
9 simply indicate what the environment was in the  
10 '40s, '50s, '60s and '70s insofar as that  
11 illuminates the conduct of Mr. Kotler in continuing  
12 to smoke to the extent that he did, and for that  
13 purpose, I will take judicial notice that during the  
14 1940s, '50s, '60s, '70s or '80s there was massive  
15 advertising on behalf of cigarettes by all of the  
16 industry, that the advertising permeated radio and  
17 television for a while and magazines, newspapers,  
18 billboards, public transportation, plaques on the  
19 sides of buses -- in fact you still see those -- and  
20 signs on the top of taxi cabs and so on.

21 So that there was a pervasive, during all  
22 the relevant period, there was pervasive advertising  
23 by the tobacco industry in promotion of the sale of  
24 cigarettes.

1 MR. NISSEN: Your Honor, at this time  
2 Plaintiffs move to introduce as Exhibit No. 3 the  
3 Frank statement.

4 MR. LANE: Objection.

5 THE COURT: Objection any other than the  
6 reasons you mentioned before?

7 MR. LANE: No, Your Honor.

8 A. The objection is overruled...

9 (Document marked as Exhibit 3  
10 received in evidence)

11 MR. NISSEN: Your Honor, if it please the  
12 Court, we will be reading some portions of  
13 vice-president Mr. Leake from American Tobacco  
14 Company.

15 BY MS. LUMSDEN:

16 "Q. Good morning, Mr. Leake?

17 "A. Good morning.

18 "Q. By the way, Mr. Leake, am I correct that  
19 you hold a position that entitles you to be called  
20 doctor?

21 "A. I have a Ph.D. in chemistry.

22 "Q. Mr. Leake, it is my understanding that  
23 you've testified on other occasions in connection  
24 with your employment at American Tobacco on issues

1 of smoking and health; is that correct?

2 "A. It is.

3 "Q. Can you tell me how many times you've  
4 testified either by deposition or in court?

5 "A. Three times."

6 MS. LUMSDEN: I left out on Page 11, Line  
7 4.

8 "Q. Are you aware, Mr. Leake, that you have  
9 been identified as a witness to speak on behalf of  
10 American Tobacco in certain designated areas  
11 pursuant to Rule 30(b)(6) of the Federal Rules of  
12 Civil Procedure?

13 "A. Yes."

14 MS. LUMSDEN: Page 20, Line 12.

15 "Q. Have you reviewed any documents prior to  
16 coming to this deposition?

17 "A. Yes.

18 MS. LUMSDEN: Page 27, Line 1.

19 "Q. Mr. Leake, how old are you?

20 "A. 58.

21 "Q. Could you give us your birth date, please?

22 "A. Yes. It's August 8, 1929.

23 "Q. Where were you born?

24 "A. Proffit, P-r-o-f-f-i-t, Virginia.

1 "Q. How far is that from your present home?

2 "A. About 100 miles."

3 MS. LUMSDEN: Down to Line 14.

4 "Q. Would you briefly describe your educational  
5 background?

6 "A. After high school, I got a B.S. degree in  
7 chemistry at the University of Virginia. I was  
8 there from 1946 to '50. Then I went on to Duke  
9 University and obtained a Master's degree in '53 and  
10 a Ph.D. degree in 1954 and the area of concentration  
11 was organic chemistry.

12 "Q. At the University of Virginia, did you have  
13 a special area of concentration within the general  
14 field of chemistry?

15 "A. No. Just a B.S. in chemistry. We covered  
16 the usual areas of organic, inorganic, analytical  
17 physical chemistry."

18 MS. LUMSDEN: Page 38, Line 8.

19 "Q. Would it be fair to say that by the time  
20 you joined American Tobacco in 1965, your knowledge  
21 in the fields of health, medicine and tobacco would  
22 be those of an ordinary person on the street?

23 "A. I think that's a fair statement.

24 "Q. How did you come to go to American

1 Tobacco?"

2 MR. BEZANSON: Excuse me, if I may, Your  
3 Honor, next is Page 39, Line 2.

4 MS. LUMSDEN: Page 39, Line 2.

5 "Q. When you first joined American Tobacco,  
6 what position did you come at?

7 "A. I came in as assistant to the managing  
8 director of research and development.

9 "Q. Could you describe for us in 1965 how the  
10 research and development department was organized at  
11 American Tobacco?

12 "A. Generally there was a group that had to do  
13 with quality assurance, a group that had to do with  
14 new product development, a group that had to do with  
15 process development, and I think that would  
16 characterize the main areas. Of course there was an  
17 administrative group that kept up with things, the  
18 library and the lawn care and all of those kinds of  
19 essentials.

20 "Q. You've listed, if I have it down correctly,  
21 four groups; quality assurance, new products,  
22 process development and the administrative group?

23 "A. Yes.

24 "Q. Did all four of those groups report to the

1 managing director of research and development?

2 "A. Yes.

3 "Q. Who is the managing director at that time?

4 "A. It was a Dr. William Harlan, H-a-r-l-a-n.  
5 This is 1965.

6 "Q. I understand that. As you understood it in  
7 1965, who did Dr. Harlan report to?

8 "A. I believe it was Mr. Virgil Hager,  
9 H-a-g-e-r.

10 "Q. What was his title?

11 "A. Something like executive vice-president for  
12 manufacturing and leaf. I'm not sure if that's the  
13 exact title, but it was something like that.

14 "Q. I take it that Mr. Hager would report to  
15 the chief executive officer?

16 "A. Yes."

17 MS. LUMSDEN: Down to Line 22.

18 MR. BEZANSON: I think next is Page 42,  
19 Line 18.

20 MS. LUMSDEN: I wanted to see the Court on  
21 this?

22 MR. BEZANSON: Yes, Your Honor. If we may  
23 approach the bench.

24 (Conference at bench....

1 MR. BEZANSON: This gets into a section  
2 about manufacturing processes and how certain kinds  
3 of reconstituted tobacco are made, some of the  
4 tobacco is taken and reformulated into a sheet, and  
5 the manufacturing processes, Your Honor, are not  
6 part of this suit truly.

7 THE COURT: What's this got to do with the  
8 case?

9 MS. LUMSDEN: It's just talking about --

10 THE COURT: What does it have to do with  
11 the case?

12 MS. LUMSDEN: Just how they make the  
13 product, Your Honor.

14 THE COURT: Totally irrelevant. The  
15 question is the effect of the product, not the  
16 process. What's the next one?

17 MR. BEZANSON: Next, Your Honor, there is a  
18 short reading on Page 43 down at the bottom on 25  
19 over to 44 on 20 which we've agreed upon.

20 MS. LUMSDEN: That has been agreed on, Your  
21 Honor.

22 THE COURT: Which?

23 MS. LUMSDEN: Starting at the very bottom  
24 here over to this page.

1 THE COURT: Okay. Have you got any other  
2 objections that you haven't agreed upon?

3 MR. BEZANSON: There are some coming up  
4 soon that will be a few pages down the road.

5 THE COURT: Do you want to deal with them  
6 now?

7 MR. BEZANSON: Sure. Which one of you two  
8 is the smoker?

9 MR. BEZANSON: I enjoy a cigarette from  
10 time to time, Your Honor. The next problem comes,  
11 Your Honor, on Page 67 and problems persist through  
12 Page 73. In the beginning you have --

13 THE COURT: Page 67, Line 17?

14 MS. LUMSDEN: Right.

15 MR. BEZANSON: You have cumulative  
16 repetition about American's present position. It is  
17 after '65.

18 MS. LUMSDEN: Basically they have not  
19 changed it and he has asked about it.

20 MR. BEZANSON: That's about the fourth time  
21 that's coming in. Now it goes immediately in the  
22 present tense --

23 THE COURT: Where?

24 MR. BEZANSON: Page 68, Line 4.

1 MS. LUMSDEN: Only because they have not  
2 changed it since '54, Your Honor. In other words,  
3 it's the position from '54 on. So in that respect  
4 it's relevant.

5 THE COURT: Fresh hole smoke? What is that

6 MR. BEZANSON: That's in distinction to the  
7 kinds of stuff they put on mouse tails, the  
8 so-called tar.

9 THE COURT: Whatever.

10 MS. LUMSDEN: The point, Your Honor, once  
11 he said '54 was their current position --

12 THE COURT: I suppose it all goes back,  
13 sure.

14 MR. BEZANSON: Now on Page 69 you get into  
15 some hypothetical sorts of questions beginning there  
16 on Line 2 and calling for speculation, conjecture.

17 THE COURT: That's rhetorical nonsense.  
18 This is Page 69, Line 2?

19 MR. BEZANSON: Yes.

20 THE COURT: That's of no probative use.

21 MR. BEZANSON: That continues on through  
22 Line 9 on Page 70. Then there is some questions  
23 about the Frank statement and I would just state to  
24 preserve on the record our objection to going into

1 it further unless you agree with me it's becoming  
2 very cumulative.

3 THE COURT: I think people are getting kind  
4 of board with this line.

5 MS. LUMSDEN: It's only these couple of  
6 pages, Your Honor.

7 THE COURT: Well, I won't stop you. But I  
8 suggest that you get -- really -- get to really what  
9 is the interesting part of this case, what  
10 information they had and what information was out in  
11 the public.

12 MR. BEZANSON: The ironic thing about this  
13 is the Frank statement that was in the public, so I  
14 don't get the point.

15 THE COURT: I think you've got a problem  
16 with it. I'm not pushing anybody, but I'm not  
17 conducting the Plaintiff's case. Anything else?

18 MR. BEZANSON: If I understand it, then  
19 that takes us on Page 70, Line 10 through 71.

20 THE COURT: Certainly when they go to work  
21 to answer alleged allegations about cigarette  
22 smoking, I'd suggest there has already been a great  
23 deal of public discussion about it.

24 MR. BEZANSON: Indeed there was.

1 THE COURT: And that, I think, is very  
2 harmful to the Plaintiff's case. So I don't know  
3 what you want to do about it.

4 MR. BEZANSON: Now, Your Honor, here on  
5 Page 72 continuing on with the Frank statement, but  
6 now we are getting a lot of attorney reading and  
7 attorney comment.

8 THE COURT: That's all going out.

9 MS. LUMSDEN: Where are we?

10 MR. BEZANSON: Page 72.

11 THE COURT: I thought you had taken all of  
12 that time to resolve these problems.

13 MR. BEZANSON: We resolved a large number  
14 of them, Your Honor. Here is the attorney reading  
15 sections of the Frank statement.

16 MS. LUMSDEN: That's him reading it.

17 MR. BEZANSON: He is being asked to read it  
18 and then the attorney characterizes it.

19 THE COURT: I will let them do it.

20 MR. BEZANSON: Here we go again with the  
21 policy. This is about the eighth time.

22 THE COURT: I will permit it.

23 MR. BEZANSON: I think next we go to Page  
24 91; is that correct?

1 THE COURT: I don't know what you can prove  
2 on Mr. Heimann. You left him saying the whole world  
3 was wrong. This is going to be climaxed.

4 MR. BEZANSON: Some people have the courage  
5 of their conviction. 91 and 92 are next, right?

6 MS. LUMSDEN: Is there a problem with  
7 those, Line 18 on 91?

8 MR. BEZANSON: I think it's out of time and  
9 irrelevant, but we can go on 93 is our next problem,  
10 Line 21. Here, Your Honor, they are talking about a  
11 time period when Preston Leake worked with the  
12 Council for Tobacco Research, and it had begun  
13 around 1976, so it's a good ten years out of time.

14 THE COURT: It seems to me to be totally  
15 irrelevant.

16 MS. LUMSDEN: Why don't I just read, for  
17 the moment, up to what we've agreed on rather than  
18 keep the jury waiting.

19 MR. BEZANSON: I think that's an excellent  
20 idea.

21 MS. LUMSDEN: So we go to 92 at the  
22 bottom?

23 MR. BEZANSON: That's right, up to 92 on  
24 the bottom.

1 MS. LUMSDEN: The last answer, okay.

2 MR. BEZANSON: Where are we now?

3 THE COURT: On Page 42.

4 MR. BEZANSON: Oh, I know, Page 43, Line 5  
5 is where we start.

6 MS. LUMSDEN: Over to 44, Line 20?

7 THE COURT: Yes. Press on.

8 ...end of bench conference)

9 MS. LUMSDEN: So we are on Page 43, Line  
10 25.

11 "Q. Now, the administrative group, as I  
12 understand it, included the library and then the  
13 folks who would take care of the other  
14 administrative functions for the research and  
15 development department such as the lawn, the mail?

16 "A. Personnel records. I didn't mention  
17 central files earlier. But that would be in there.

18 "Q. When you say "the library," what fields  
19 would the library cover?

20 "A. Generally those things that would be  
21 pertinent to the scientific interest in the  
22 department and that's chemistry and agriculture for  
23 the most part. We also have over the years  
24 collected information that relates to smoking and

1 health.

2 "Q. In 1965, was there a section of the library  
3 that concerned itself with smoking and health?

4 "A. Well, I wouldn't call it a section of the  
5 library. It's just another area of subject matter  
6 that was covered."

7 MS. LUMSDEN: Page 45, Line 3.

8 "Q. Would it be fair to say that the library  
9 primarily concerned itself with chemistry and  
10 agriculture as opposed to health effects in 1965?

11 "A. Well, again, primary is an indefinite term  
12 and I'm just not sure how to designate that.  
13 Significant effort was spent on collecting  
14 information on smoking and health.

15 "Q. Who is responsible for expanding that  
16 effort?

17 "A. The lady who was in charge of the library  
18 then and still is, Mrs. Dorothy Robben,  
19 R-o-b-b-e-n. Maybe in 65 she had more  
20 responsibility for central files and there was a  
21 gentleman named John Sharp who had more  
22 responsibility for the library and eventually Mr.  
23 Sharp left the company and Mrs. Robben took over  
24 responsibility for both those areas.

1 "Q. How did either of those persons go about  
2 assembling that library of articles or books  
3 relating to smoking and health?

4 "A. I don't know what criteria they might have  
5 used. To be specific on a more general basis, I  
6 think it had to do with those things that were  
7 statistically associated with smoking.

8 "Q. How did they find that out? How did they  
9 know what to put in the library?

10 "A. I'm trying to get my time frame straight.  
11 We got material from the Council for Tobacco  
12 Research, something called current digest. I'm just  
13 not sure when that started. Probably in the late  
14 '50s. So that would have been going on when I  
15 wasn't there, but I'm guessing now. I really don't  
16 know the time frame. The diseases which are  
17 statistically associated with cigarette smoking are  
18 well known.

19 "Q. Well, what are they?

20 "A. Well, lung cancer, heart disease, emphysema  
21 are three that would occur to me.

22 "Q. Did the library in 1965 subscribe to  
23 leading medical journals which covered those parts  
24 of the body?

1 "A. I don't know what they subscribed to at  
2 that time.

3 "Q. Are there records that would indicate what  
4 they subscribe to?

5 "A. Yes, I believe so.

6 "Q. In 1965?

7 "A. Yes. I would certainly think there would  
8 be such records.

9 "Q. How would those records be maintained?

10 "A. Someone in the library, Mrs. Robben, would  
11 know about that.

12 "Q. Are there records that would show what  
13 volumes or articles were in the library on smoking  
14 and health in 1965?

15 "A. Well, there is the whole card catalog  
16 indexing. That has been maintained intact over the  
17 years. So those records would be there.

18 "Q. Would that card catalog indicate what  
19 articles or volumes were in the library in a  
20 particular year or when the articles or volumes were  
21 added?

22 "A. I'm not sure they would. We have something  
23 else which is called the accessions list that's  
24 published on a monthly basis. That's published now

1 and it has been put together by the library staff  
2 for a long period of time. Just how long, I'm not  
3 sure.

4 "Q. What is the accessions list?

5 "A. Just that. It's a list of the books and  
6 articles which have been acquired by the library  
7 within the time frame of this publication."

8 MS. LUMSDEN: Page 48, Line 20.

9 "Q. There would also be records, I take it, Mr.  
10 Leake, that would show publications that the library  
11 was subscribing to back to the time the library was  
12 started, wouldn't there?

13 "A. I think there is a good chance that  
14 information of that sort would be available. I just  
15 don't know specifically that it is.

16 "Q. When was the library started?

17 "A. Probably in the '30s, 1931 rings a bell  
18 with me, but I wouldn't want to be held to that date  
19 either."

20 MS. LUMSDEN: Page 50, Line 10.

21 "Q. Dr. Harlan is the managing director of  
22 research and development. What was his educational  
23 background?

24 "A. Ph.D. and his field was organic chemistry.

1 "Q. His assistant Mr. Harlow?

2 "A. Mr. Harlow had a B.S. in chemistry with  
3 some postgraduate work in chemistry but I don't  
4 believe he got an industrial degree.

5 "Q. Was there anybody in the research and  
6 development department in 1965 who had any medical  
7 training?

8 "A. In 1965, not that I'm aware of.

9 "Q. Just so my question was clear, by 'medical  
10 training," I don't mean someone necessarily with an  
11 M.D., but someone who had been trained as a nurse or  
12 an industrial hygienist or had training in the field  
13 of public health, any of those related fields, would  
14 your answer be the same?

15 "A. Now that I got the time frame in mind, we  
16 hired a gentleman with an M.D. degree probably in  
17 1965.

18 "Q. Prior to that there had been no one with a  
19 many did degree working at American?

20 "A. I don't believe there had been."

21 MS. LUMSDEN: Page 52, Line 16.

22 "Q. Was there any other person with any medical  
23 training defined in the broad way I did a moment ago  
24 at American in whatever division up until 1965

1 before you hired this one doctor you're about to  
2 tell us about?

3 "A. Not that I'm aware of.

4 "Q. In 1965, then, I take it someone new was  
5 hired as a doctor?

6 "A. Yes.

7 "Q. Who was that?

8 "A. It was Arthur W. Burke, B-u-r-k-e-, Jr.

9 "Q. What was his position when he came to  
10 American?

11 "A. I don't know his title.

12 "Q. What was his responsibility?

13 "A. He reviewed pertinent literature. He had  
14 been previously employed at the medical college of  
15 Virginia. As far as I know, he had not practiced.  
16 He had a Ph.D. in biophysics and an M.D. degree and  
17 he had been at the medical college in Virginia in a  
18 program that American supported there for years.  
19 While there he did some work on carbon monoxide  
20 metabolism, but when he actually moved into the  
21 department he continued to have some contact with  
22 the people at the medical college of Virginia and  
23 also to keep up with smoking and health literature  
24 for the research and development department.

1 "Q. That's what I was going to ask you. You  
2 mentioned you reviewed pertinent literature.  
3 Pertinent to what?

4 "A. Smoking and health.

5 "Q. Before Dr. Burke came to American, who was  
6 responsible for reviewing literature in the field of  
7 smoking and health?

8 "A. I don't think we had anybody with that sole  
9 responsibility.

10 "Q. Well, who had that as a partial  
11 responsibility?

12 "A. Well, of course, the director of research  
13 and development or the assistant director. The  
14 titles have changed. I talked about managing  
15 directors and somewhere along the lines he became  
16 director of research and development, but the  
17 function was the same. The library staff including  
18 Mr. John Sharp and Mrs. Robben would bring  
19 information to the attention of those of us who had  
20 some management responsibilities.

21 "Q. Would I be correct that before Dr. Burke  
22 was hired, the persons at American who were as part  
23 of their jobs had responsibility for reviewing  
24 literature on smoking and health issues were the

1 director of research development who at that time  
2 was Mr. Harlan and the assistant director Mr. Harlow  
3 and yourself as well as the library staff, would  
4 that be correct?

5 "A. Yes.

6 "Q. Did any of those persons, the director, the  
7 assistant director or yourself or the library staff  
8 have any medical training that would enable you to  
9 understand medical articles?

10 "A. No special training.

11 "Q. So other than the fact that you all have  
12 training in the field of chemistry, you would be  
13 reviewing these articles with the background of  
14 basically a layperson with some postgraduate  
15 training; is that right?

16 "A. That's correct.

17 "Q. Who was the director or yourself or the  
18 assistant director supposed to report anything they  
19 gleaned from review of this literature?

20 "A. Well, there is a whole another area that we  
21 haven't talked about and that's the Council for  
22 Tobacco Research. We depended upon the Council for  
23 Tobacco Research and its predecessor the Tobacco  
24 Industry Research Committee for advising the company

1 about such matters. But in answer more specifically  
2 to your question, I think it would be the normal  
3 reporting channels.

4 "Q. What was the normal reporting channel when  
5 it came to information concerning smoking and health  
6 that the people in research and development acquired  
7 by the means that we've just described?

8 "A. Well, we've talked about Mr. Hager, Dr.  
9 Harlan and Mr. Harlow earlier in this deposition.  
10 Those are the channels that I'm referring to.

11 "Q. I have it down correctly, then, the three  
12 folks who have managing responsibility in research  
13 and development, if they learned anything from their  
14 review on the literature on smoking and health  
15 issues, were reported to the vice president of  
16 manufacturing, Mr. Hager; is that right?

17 "A. That's correct.

18 "Q. Does Mr. Hager have any medical training?

19 "A. No.

20 "Q. Do you know what his educational background  
21 is?

22 "A. I think he was an engineer.

23 "Q. As far as you know, would it be Mr. Hager's  
24 responsibility to bring this up to the chief

24 "A. I don't think I have any specific assigned

1 responsibility in that regard. The accessions list  
2 routinely came across my desk; the library  
3 accessions list that we referred to earlier.

4 "Q. Did you regularly read any particular  
5 medical periodicals which I think you said would not  
6 be on the accessions list because they were being  
7 received every month or so?

8 "A. No, I don't believe so."

9 MS. LUMSDEN: Page 64, Line 14.

10 "Q. I guess you have been in the R&D department  
11 for a total of 23 years?

12 "A. It will be 23 years in June."

13 MS. LUMSDEN: Page 67, Line 17.

14 "Q. Mr. Leake, as the 30(b)(6) witness speaking  
15 for American Tobacco, what is American Tobacco's  
16 position on the issue of whether cigarette smoking  
17 causes lung cancer in humans?

18 "A. While I think our position has been stated  
19 a long time ago in 1954. You've probably seen the  
20 Frank statement. We have not changed our position  
21 since that time.

22 "Q. Well, help me, Mr. Leake, because this is  
23 the first deposition I have had American Tobacco in  
24 this case or personally in any other tobacco case.

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1 Tell me what the position is?

2 "A. Well, I can tell you that I'm not aware of  
3 any disease or dysfunction which is caused by  
4 refresh, whole smoke or by the materials in refresh  
5 whole smoke at the concentrations found there.

6 "Q. I assume that's there in?

7 "A. Yes. Concentrations found in fresh whole  
8 smoke.

9 "Q. Doctor, if I understand what you've just  
10 told me, the answer to my question, which I'll say  
11 again is, does American Tobacco believe that  
12 cigarette smoking causes lung cancer is no; is that  
13 correct?

14 "A. Again, let me make sure what I understand  
15 what you're saying. Let me get the first part of  
16 your question again. Does what?

17 Q. Does American Tobacco believe that  
18 cigarette smoking causes lung cancer in humans?

19 "A. No."

20 MS. LUMSDEN: On Page 70, Line 10.

21 "Q. Was that the position of the American  
22 Tobacco Company in 1954?

23 "A. The best indication that I can give you of  
24 the company's position in 1954 is the comment in the

1 Frank statement. That was published, I think,  
2 January 4, 1954 and it was widely circulated.

3 "Q. To simplify --

4 MR. BEZANSON: Where are you now?

5 MS. LUMSDEN: The next question, Line 16.

6 MR. BEZANSON: Which page?

7 MS. LUMSDEN: 70.

8 "Q. To simplify matters, let me put it in front  
9 of you. The copy I have is readable, but it's  
10 somewhat small. I represent to you that that's an  
11 accurate copy of that statement?

12 "A. What I'm referring to is in one sentence  
13 here in the lower left-hand side that says 'We  
14 believe the products we make are not injurious to  
15 health.'

16 Q. Would you agree with me, Mr. Leake, that  
17 products as used in that statement mean cigarettes?

18 "A. Yes.

19 "Q. Is that American's position today?

20 "A. Yes. This is a Frank statement to  
21 cigarette smokers. That's the heading. I read you  
22 a sentence from it.

23 "Q. I would agree with you that you did. Mr.  
24 Leake, would you look at the immediately preceding

1 sentence to the one that you read in the record a  
2 moment ago.

3 A. Yes.

4 "Q. Would you please read that into the record,  
5 the Frank statement to cigarette smokers.

6 A. I think you're referring to the sentence  
7 that says 'we accept an interest in people's health  
8 as a basic responsibility paramount to every other  
9 consideration in our business.'

10 Q. You had a problem with that. Why don't you  
11 read it again in full so that the record is clear.

12 A. 'We accept an interest in people's health  
13 as a basic responsibility paramount to every other  
14 consideration in our business.'

15 Q. That sentence is part of a policy statement  
16 by American Tobacco and other tobacco companies  
17 issued in 1954; isn't that right?

18 "A. That's correct.

19 "Q. And by other people's health or people's  
20 health, would I be correct in assuming that that  
21 refers to cigarette smokers' health?

22 "A. Well, it's addressed to cigarette smokers.  
23 It's the Frank statement to cigarette smokers.

24 "Q. That's the people they are referring to in

1 that sentence you just read?

2 "A. I believe so.

3 "Q. What are the other considerations that are  
4 referred to in that sentence?

5 "A. I'm not sure of what they had in mind when  
6 this statement was drawn up.

7 "Q. Well, as a representative of American, do  
8 you know what they had in mind?

9 "A. I do not.

10 "Q. Is that statement about people's health  
11 being the paramount consideration, is that still  
12 American's policy?

13 "A. I don't know of any change that has been  
14 made in the policy in that regard.

15 "Q. As a representative of American Tobacco,  
16 Mr. Leake, is that American's policy today?

17 "A. I told you that I'm not aware of any change  
18 that has been made in this policy.

19 "Q. But that is not the same as the direct  
20 answer to my question. Does that mean that the  
21 answer to my question is no, there has been no such  
22 change?

23 "A. I'm giving you the best information that I  
24 have. I'm not aware that any change that has been

1 made.

2 Q. Is there any other person at American  
3 Tobacco who would be in a better position to know if  
4 such a change had been made than you?

5 A. I don't know if there is or there isn't."

6 MS. LUMSDEN: I will stop there, Your  
7 Honor.

8 THE COURT: All right. What are you going  
9 to do now.

10 MR. INGE: Your Honor, I'd like to call  
11 Joanne Kotler to the stand.

12

13 (JOANNE G. KOTLER, Sworn)

14

15 DIRECT EXAMINATION

16 BY MR. INGE:

17 Q. Please tell the Court and jury what your  
18 name is.

19 A. My name is Joanne Gertrude Kotler.

20 Q. Where do you live, Mrs. Kotler?

21 A. I live [DELETED]

22 Q. How old are you?

23 A. 51 years of age.

24 Q. You are 51?

1 A. Yes, I am.

2 Q. Are you married?

3 A. I'm widowed.

4 Q. Mrs. Kotler, would you tell the jury your  
5 date of birth?

6 A. January 19, 1939.

7 Q. Where were you born?

8 A. Boston City Hospital.

9 Q. After you were born at the Boston City  
10 Hospital in 1939, when you were brought home, where  
11 was your home?

12 A. [DELETED]

13 Q. Is that in the South End of Boston?

14 A. Yes.

15 Q. How long did you reside in the South End of  
16 Boston?

17 A. For two and a half years.

18 Q. And at some point your family made its way  
19 over to [DELETED] to save us some time?

20 A. Yes.

21 Q. When was that?

22 A. 1942.

23 Q. And as you grew up in [DELETED] did you  
24 have both your parents, were they both alive?

1 A. Yes, they were.

2 Q. Did either of your parents smoke?

3 A. Yes, they did.

4 Q. Which?

5 A. Both parents smoked.

6 Q. Did you have brothers and sisters?

7 A. Yes. I have three brothers.

8 Q. Where do you fall in line?

9 A. I'm the oldest.

10 Q. Now, Mrs. Kotler, have you been deposed in  
11 this case?

12 A. Yes, I have.

13 Q. Would you explain to the jury what it is  
14 I've just placed in front of you?

15 A. You've placed the five or six days of  
16 testimony that I gave to the American Tobacco  
17 Company. These are the volumes from that  
18 deposition.

19 Q. You understood that that was a part of  
20 pretrial preparation?

21 A. Yes, I did.

22 Q. And that they were entitled to take your  
23 deposition?

24 A. Yes, I did.

1 Q. Now, they asked you a lot of questions?

2 A. Yes.

3 Q. And you, to the best that you were able,  
4 answered the questions?

5 A. Yes.

6 Q. But they asked you questions, for instance,  
7 about the sexual relations between you and your  
8 husband from 1960 up until 1986?

9 MR. LANE: Objection, Your Honor.

10 THE COURT: Sustained. What occurred at  
11 the depositions is only material insofar as that it  
12 may be brought up if there is inconsistent  
13 statements. You are trying to get from this witness  
14 the facts material to this case.

15 MR. INGE: Thank you, Your Honor.

16 Q. Mrs. Kotler, will you tell the jury  
17 something about your upbringing in [DELETED] maybe  
18 starting with in what part of [DELETED] you and your  
19 family lived?

20 A. Well, we lived in a part and I still reside  
21 there in a part called [DELETED] My parents  
22 purchased the house that I live in. It's a four  
23 family. It's a duplex four family. After he  
24 returned from the second world war, he was in the

1 Army --

2 Q. Your father?

3 A. Yes. My father was in the second world  
4 war. They bought the house and we moved from  
5 [DELETED] to the house that I'm in presently at  
6 [DELETED]

7 Q. What did your father do?

8 A. My father was a baker for the Stop & Shop  
9 Company. The bakery was located on Causeway Street  
10 in the North End.

11 Q. Continue to tell the jury, give them some  
12 idea about your upbringing and what it was like in  
13 your [DELETED] neighborhood as a youngster?

14 A. Well, in [DELETED] we had large  
15 families. It was very family orientated, and there  
16 were a lot of brothers and sisters and friends  
17 running around, we had a lot of playmates. We also  
18 had an elementary school about a block and a half  
19 away from our house, which all of us attended or  
20 most of us attended. It was a very close-knit  
21 neighborhood and they were hard working people.

22 Q. Would you consider that you had a happy  
23 childhood?

24 A. Yes, I do.

1 Q. Now, at some point you, of course, started  
2 attending school and at a later point high school?

3 A. Yes.

4 Q. What high school did you attend?

5 A. I attended Cambridge Rindge and Latin.

6 Q. That's the same high school your daughter  
7 Susan testified graduated from?

8 A. When I graduated it was Cambridge High and  
9 Latin. It was a co-ed school. On the other side of  
10 the street they had what was called Rindge Technical  
11 High School. Mostly that was comprised of all  
12 boys. It was a trade school but also a school, a  
13 very good academic school to train males to go to  
14 college. I'm not saying that Cambridge Rindge and  
15 Latin wasn't, but we were great rivals, football  
16 seasons, football teams and everything. There was a  
17 strong tradition there of rivals and, of course, all  
18 the boys -- it was always comprised of boys, Rindge  
19 Tech. I don't recall when, but the two schools  
20 merged, and Susan graduated from that school but the  
21 name had changed from Cambridge Rindge and Latin.

22 Q. Did you graduate?

23 A. Yes. I graduated in 1956.

24 Q. Did you go on further with your education

1 after you graduated from high school?

2 A. No.

3 Q. Tell the jury and his honor what your  
4 current occupation is?

5 A. I'm secretary for the Cambridge School  
6 Department. As a matter of fact, I'm working at  
7 Cambridge Rindge and Latin in a program called the  
8 fundamental program. Basically what that is is a  
9 strong emphasis on reading, writing, math, sciences  
10 and it's a very structured program. They stress  
11 discipline. If students are out, we need to call  
12 the home if we haven't heard from the parents. They  
13 closely monitor the students if they are having  
14 difficulties with subjects. There are people on the  
15 staff that recognize this, arrange tutors. We do  
16 everything we can to help the student be successful  
17 in his high school years and beyond.

18 Q. Let me back you up a little bit. What is  
19 your maiden name?

20 A. Maggio.

21 Q. You grew up and you are Joanne Maggio?

22 A. Yes.

23 Q. And in 1958 -- are you with me?

24 A. Yes.

1 Q. -- you met a man named George Kotler?

2 A. Yes.

3 Q. Tell the jury about that?

4 A. Well, in 1958 there was a bunch of us girls  
5 that hung around, about five, six, maybe seven of  
6 us, and my girlfriend Betty Ann was going out with  
7 some guy, I can't recall his name, and he had  
8 friends, and anyway the two groups met, and I met  
9 George at that time. I went out with him once or  
10 twice, but basically what we did was we did a lot of  
11 double dating. That's how I was initially  
12 introduced to him was through my girlfriend Betty  
13 Ann.

14 Q. I guess we now know at some point the  
15 relationship got closer?

16 A. Yes.

17 Q. Tell us just briefly about the course of  
18 your courtship with George Kotler?

19 A. Well, I seem to recall that there was some  
20 concern amongst us girls that some of us didn't have  
21 dates for New Years. It was a thing we were talking  
22 about and there were a few guys around, and my  
23 husband -- well, George at the time asked me if I  
24 would like to go out to dinner and to a movie, and I

1 said yes, and we went out. It was New Year's Eve  
2 was our first date.

3 Q. Was that New Year's Eve changing from 1958  
4 to 1959?

5 A. No. Changing from 1959 to '60.

6 Q. At some point did you take George home to  
7 meet your parents?

8 A. He came that night to pick me up at the  
9 house.

10 Q. Now, let's skip along a bit. You became  
11 married?

12 A. Yes.

13 Q. When did you and George Kotler become  
14 married?

15 A. George and I married October 21, 1961 at a  
16 ten o'clock mass at the Blessed Sacrament Church in  
17 Cambridge.

18 Q. Whose church was that; was that George's  
19 church or your church?

20 A. That's the parish that was associated with  
21 the neighborhood I was living in. Girls got married  
22 from the parish. You always get married out of the  
23 girl's parish or at least you did at that time.

24 Q. What was George's -- in other words, if I

1 have this right, George was living in East  
2 Cambridge?

3 A. Yes.

4 Q. What was the East Cambridge parish?

5 A. George attended Sacred Heart Church.

6 Q. Did you tell me he used to be an alter boy  
7 at that church?

8 MR. LANE: Objection, Your Honor.

9 MR. INGE: I can rephrase it.

10 THE COURT: Never mind. Let's move along.

11 Q. In any event, you got married?

12 A. Yes.

13 Q. After you became married, where did you  
14 take up your marital home?

15 A. We had an apartment on Cambridge Street in  
16 East Cambridge.

17 Q. How did you stay there?

18 A. We stayed there about a year, a year and  
19 two months.

20 Q. Now, by the way, when you met George Kotler  
21 in 1958, was he a smoker?

22 A. Yes, he was.

23 Q. Did he smoke this brand of cigarette?

24 A. Yes, he did.

1 Q. Now, at some point in the early '60s --

2 THE COURT: I think the record should show  
3 what you are holding up. I take it it is Pall Mall  
4 cigarettes in a red pack?

5 MR. INGE: Correct, Your Honor, the famous  
6 cigarettes.

7 Q. At some point in the early '60s you became  
8 pregnant?

9 A. Yes, I did.

10 Q. Did that pregnancy lead to what person?

11 A. My first born, Steven. He was born October  
12 17 of 1962.

13 Q. You were then to go on to have other  
14 children?

15 A. Yes.

16 Q. How many have you had?

17 A. I have had four children. After Steve was  
18 Susan born in 1964. I had David born in 1965. I  
19 had Michael born in 1967.

20 Q. Was your husband at any of the births of  
21 the four children?

22 A. Oh, yes. He was allowed in the labor  
23 room. Husband's were allowed in the labor room at  
24 that time.

1 Q. Do you from your own knowledge know what  
2 your husband would be doing in the labor room?

3 MR. LANE: Objection, Your Honor.

4 THE COURT: Sustained. Not smoking, I  
5 assume?

6 MR. INGE: Ah, to the contrary.

7 A. He would be offering me assistance, how was  
8 I feeling. You were able to smoke in the labor room  
9 and he would smoke and I would take puffs from his  
10 cigarette, but I did have other things to deal with  
11 at the time. But he was very helpful and, you know,  
12 until I was almost ready to deliver and he would go  
13 out and wait and I would be wheeled into the  
14 delivery room.

15 Q. Now, what was your husband's smoking  
16 behavior, let's say, in the first half of the '60s?

17 MR. LANE: Objection. Just from the  
18 broadness I object to the question.

19 MR. INGE: I will withdraw it, Your Honor.

20 THE COURT: No, that's perfectly all  
21 right. If the behavior was consistent throughout  
22 the period rather than taking it week by week and  
23 year by year. Go ahead.

24 A. My husband smoked -- when you say what

1 was -- would you repeat the question, please?

2 Q. Let's do it this way. When you and George  
3 were married, where did your husband work?

4 A. He worked at Packey's.

5 Q. Then at some point after that did he get  
6 other employment?

7 A. Yes, he did.

8 Q. Where was that?

9 A. Boston Woven Hose.

10 Q. Approximately how long did he work at the  
11 Boston Woven Hose?

12 A. He worked at the Boston Woven Hose nine  
13 years and nine months.

14 Q. Mrs. Kotler, would you tell the jury how it  
15 is that you recall how it is that he worked nine  
16 years and nine months?

17 MR. LANE: Objection.

18 THE COURT: Overruled.

19 A. I recall it, because there had been rumors,  
20 say, probably after he had been there nine years  
21 that the company was thinking of moving. They  
22 weren't going out of business per se but they were  
23 merging with another company or another division of  
24 American Biltrite Rubber, so that he would no longer

1 be working in Cambridge, and there had been rumors  
2 in the company, so he was very concerned about not  
3 having a job. He was not sure of what benefits, if  
4 any, he would be entitled to, because he had not  
5 been there ten years.

6 He had decided, and I don't recall when,  
7 to take the post office exam, and he did pass it,  
8 and he had to make a decision should he go with the  
9 post office or should he remain at American Biltrite  
10 Rubber for three months to complete the ten years so  
11 that years down the road he would have some sort of  
12 benefits for being there for ten years. The post  
13 office called him, he took the test in August and  
14 they called him in October.

15 His first day of employment was the  
16 birthday of my oldest son, October 17th. But I  
17 can't recall the year. I believe it was 1970.

18 Q. So, then, he wasn't an at Boston Woven Hose  
19 for a sufficient enough time to become entitled to  
20 whatever benefits accrue after ten years?

21 A. No, he was not.

22 Q. Now, did your husband smoke in the '60s?

23 A. Yes, he did.

24 Q. Now, at some point in the '60s your

1 husband -- oh, let me ask it this way. When did  
2 your husband stop smoking Pall Mall cigarettes?

3 A. I did at one time say that I thought he had  
4 smoked or that he stopped smoking Pall Malls in  
5 1967. I have since been told by his friends --

6 MR. LANE: Your Honor, may I approach the  
7 bench, please, on this? I object to this answer.

8 THE COURT: Okay.

9 (Conference at bench...

10 MR. LANE: I did not anticipate this, but  
11 we had a pretrial stipulation that the pretrial  
12 conference of December 21st that one of the agreed  
13 statements to which there was no objection was that  
14 he smoked cigarettes made by manufacturers other  
15 than American from 1967 or '68 until his death. Now  
16 I gather from this they -- and I relied upon that in  
17 making my opening to this jury -- now they want to  
18 change the testimony, apparently, which I knew  
19 nothing about until this minute, and I think that's  
20 highly prejudicial to me when we had a stipulation  
21 of facts on that issue.

22 THE COURT: What difference does it make?

23 MR. LANE: It makes a lot of difference,  
24 Your Honor, because I think the jury looks to any

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1 representation by counsel at opening as being true,  
2 and I have to have a good faith basis for saying  
3 what I say in an opening.

4 THE COURT: She said that she has already  
5 said that one time.

6 MR. LANE: I understand that, Your Honor,  
7 but now she's going to change the testimony.

8 THE COURT: Considering all of this case  
9 has to do with prior --

10 MR. INGE: The fact is, Your Honor,  
11 it's the truth.

12 THE COURT: Well, it's hearsay.

13 MR. INGE: I just want to say for the  
14 record in going over this, and I assume because of  
15 litigation, people are coming out of the woodwork  
16 and they are saying, no, no, I met George in '70 and  
17 he was still smoking Pall Malls, and I found out  
18 maybe this morning, but as to relevance, I don't  
19 know.

20 THE COURT: How do you get past the hearsay  
21 aspects of it?

22 MR. INGE: Well, I'm not sure it's being  
23 offered for the truth.

24 THE COURT: What is it being offered for?

1 MR. INGE: Well, Your Honor, I don't know.  
2 I mean to be frank, but I don't know.

3 THE COURT: I appreciate that. I don't  
4 have to go any further. I think that I will let her  
5 testify as to what she observed.

6 MR. LANE: Your Honor, it was her testimony  
7 at the deposition it was clearly '67 or '68.

8 THE COURT: I understand.

9 ...end of bench conference)

10 THE COURT: I will allow testimony as to  
11 what the witness observed, but the other information  
12 that was about to be offered runs a foul of the  
13 ruling as to hearsay, so I will have to exclude it.

14 Q. Did your husband ever tell you when he  
15 began smoking Pall Malls?

16 MR. LANE: Objection, Your Honor.

17 THE COURT: That can be answered yes or no.

18 A. Yes.

19 Q. What did he tell you?

20 MR. LANE: Objection, Your Honor.

21 THE COURT: Now, that's the question that  
22 raises the problem.

23 (Conference at bench...

24 MR. LANE: This is the same issue we had

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1 with Susan yesterday.

2 THE COURT: Yes, but it's a little bit  
3 different. First of all, you were put on notice  
4 that it was going to come out, so that distinguishes  
5 it from Susan, and the second question is whether  
6 the statement is more probative on the point for  
7 which he is offering it. Do you have any other  
8 evidence on that point?

9 MR. NISSEN: No, Your Honor.

10 MR. LANE: Here we go again. Bubba Coveney  
11 has been deposed in this case, a childhood friend of  
12 George.

13 THE COURT: What is the question again.

14 MS. LUMSDEN: The brand of how long he  
15 smoked Pall Malls.

16 MR. SHEFFLER: When he started smoking Pall  
17 Malls is the question that was on the record.

18 MS. LUMSDEN: That's something Mr. Coveney  
19 doesn't recall.

20 MR. LANE: He was never asked.

21 MS. LUMSDEN: It's the only evidence we  
22 will be proffering on this, Your Honor.

23 THE COURT: That's not what the rule says.

24 MS. LUMSDEN: He is the most reliable we

1 have been able to find of anyone.

2 THE COURT: Have you asked Mr. Coveney?

3 MR. NISSEN: Yes. He doesn't remember.

4 THE COURT: Then it's more probative on the  
5 point which is offered for any other evidence.

6 MR. LANE: Then we have the other problem,  
7 Your Honor, the circumstances under which this  
8 testimony or information was obtained by her was be  
9 obtained under highly credible circumstances.

10 THE COURT: I knew this was going to come  
11 up, so I did some thinking about it. The  
12 credibility breaks down into two parts; the  
13 credibility of the witness as to whether he ever  
14 said this is for the jury and the credibility of Mr.  
15 Kotler as to whether he was telling his wife the  
16 truth --

17 MR. LANE: Whether he was a good historian  
18 or otherwise, yes.

19 THE COURT: -- is the question here. And I  
20 have come to the opinion that this is a matter of  
21 casual conversation which prior to Mr. Kotler's  
22 death, prior to the beginning of litigation, was not  
23 faulty in any way but to reduce to tell anybody from  
24 less than the truth.

1 MR. LANE: I think it's unclear in the  
2 deposition. She has been asked several times in the  
3 deposition leading up to it in the final question  
4 whether you ever had any discussion with Mr. Kotler  
5 about Pall Malls and when he started, and the answer  
6 was always no.

7 THE COURT: Now she says yes. That may be  
8 something you want to take up on cross.

9 MR. LANE: I understand. When she did say  
10 he told me he started smoking at age 11 he smoked  
11 Pall Malls, the next question was when, where, what,  
12 how, under what circumstances, she had no memory  
13 whatsoever.

14 THE COURT: This comes down to her  
15 credibility. I understand. But it wasn't  
16 established until after she had engaged counsel in  
17 this case.

18 MR. SHEFFLER: She engaged counsel and Mr.  
19 Kotler talked to the lawyers before.

20 MR. LANE: Diana Lumsden was in touch with  
21 Mr. Kotler before he even died.

22 MS. LUMSDEN: Have I testified in this  
23 case --

24 MR. LANE: No. But that was her testimony

1 that he had been in touch with this law firm, and  
2 she did not exclude the fact that it happened even  
3 after counsel was engaged. So the circumstances of  
4 making the statement itself becomes suspected is  
5 what I'm saying.

6 THE COURT: I think the suspect aspect of  
7 it can be accounted for on cross examination.

8 MR. SHEFFLER: Your Honor, if I may, aren't  
9 these circumstances in the conditions under which a  
10 statement is made a determination that has to be  
11 made before the statement can be entered as  
12 hearsay? Isn't that determination first before it's  
13 considered to be an exception to the hearsay?

14 THE COURT: The question is is it a  
15 circumstantial guarantee of truth worthiness. It  
16 strikes me as the kind of comment which ordinarily  
17 somebody would not bother to --

18 MR. BEZANSON: It also goes to the  
19 Plaintiff's statements and that's tested before it's  
20 proven to be a hearsay rule. What she's offering is  
21 hearsay.

22 THE COURT: That's your test on cross  
23 examination.

24 MR. SHEFFLER: But what we are talking

1 about is the statement itself, as I understand the  
2 rule, the circumstances under which the statement is  
3 given should be explored before --

4 THE COURT: Do you want to ask a  
5 preliminary question?

6 MR. INGE: No, Your Honor.

7 MR. LANE: It should be outside the  
8 presence of the jury for Your Honor's determination.

9 THE COURT: The objection is overruled.  
10 ... end of bench conference)

11 (Reporter read back pending question)

12 A. My husband told me he had been smoking Pall  
13 Malls since age 11.

14 Q. Mrs. Kotler, I'd like you just to take a  
15 moment to describe to the jury what your husband was  
16 like in terms of what did he like, what were his  
17 interests and his activities?

18 MR. LANE: Perhaps we might have this as  
19 one question at a time, Your Honor?

20 THE COURT: I think that's a good idea.

21 Q. Mrs. Kotler, are you able to describe for  
22 the jury your husband's interests in the 1960s?

23 A. His interests in the 1960s were sports.

24 Q. What sports?

1           A.     Baseball, football, dog racing. That was  
2 mainly the sports that was mainly the things he was  
3 interested in.

4           Q.     While at the Boston Woven Hose, was he a  
5 member of any team associated with that company?

6           A.     Yes. He was on a bowling team. He was on  
7 there two or three years, a member of their bowling  
8 team.

9           Q.     Did he get a jacket as a result?

10          A.     Yes. He did get a jacket one time and  
11 another time he brought home a trophy. How that  
12 worked was --

13                 MR. LANE: I would object, Your Honor. I  
14 think this is being volunteered. There is no  
15 question.

16                 THE COURT: Wait for the question. Next  
17 question.

18          Q.     Now, you mentioned dog racing?

19          A.     Yes.

20          Q.     Which was something your husband was  
21 interested in?

22          A.     Yes.

23          Q.     How about you, did you have any interest in  
24 dog racing?

1 A. Yes.

2 Q. Tell the jury and those of us who perhaps  
3 do other things what it's like at Wonderland and  
4 what the big deal is all about?

5 A. I thought I heard an objection.

6 MR. LANE: I retracted it.

7 THE COURT: Go ahead.

8 A. When I was younger before I met George, I  
9 used to go to the dog track with my father and  
10 mother and my aunts and uncles and an assortment of  
11 their friends, and it was exciting. They have  
12 greyhounds that run around the track. You can bet  
13 on them. You have a chance of winning a little  
14 money, and the crowd gets excited. But I seem to  
15 recall most of all that I was able to eat all the  
16 Sunday days and hot dogs that I wanted. But that's  
17 how I used to go to Wonderland earlier.

18 Q. How old would you be then?

19 A. 16, 17. I believe I was under age.

20 Q. I won't tell.

21 A. Tall for my age.

22 Q. Tell the jury something about the dogs and  
23 some of the famous dogs that you've come to know?

24 MR. LANE: Objection, Your Honor.

1 THE COURT: Sustained. Let's get on to the  
2 subject of smoking. This is really what we are  
3 talking about.

4 MR. INGE: Well, Your Honor, they made such  
5 a deal out of this dog tracks --

6 THE COURT: I don't care what they made a  
7 deal out of. I will state this as a proposition.  
8 Just because one side gets into irrelevancy is no  
9 excuse for the other side to do more of the same.  
10 That works both ways.

11 Q. Did your husband watch television?

12 A. Oh, yes.

13 Q. What were some of his stars or here owes  
14 that he liked?

15 MR. LANE: Objection, Your Honor.

16 MR. INGE: I will withdraw the question.

17 THE COURT: Ask another one.

18 Q. Did your husband know of Arthur Godfrey?

19 MR. LANE: Objection, Your Honor.

20 THE COURT: Overruled.

21 A. Yes. I didn't hear what he said.

22 THE COURT: I recover ruled the objection.  
23 You can answer the question.

24 A. Yes. He loved his show. It had singing

1 and dancing and my husband loved singing and  
2 dancing, movies.

3 Q. Now, when your husband stopped smoking Pall  
4 Mall cigarettes, without mentioning brand, what type  
5 of cigarette did he switch to?

6 A. A filtered cigarette.

7 Q. Was your husband a reader?

8 A. Yes.

9 Q. What kinds of things would he read?

10 A. Sports stories, biographies of sports  
11 players, biographies of movie stars. I can't recall  
12 everything that he would read. Mysteries at times,  
13 war books.

14 Q. He was in the Navy at one point?

15 A. My husband served in the Korean war from  
16 1951 to 1955.

17 MR. INGE: We are three minutes away, Your  
18 Honor. I will fill it up.

19 THE COURT: Fill it up. If you haven't got  
20 a good question, we will quit.

21 MR. INGE: I've got a lot of them, but I  
22 don't know which one to choose.

23 THE COURT: Do you want to start tomorrow  
24 morning?

1 MR. INGE: Yes.

2 THE COURT: Do you expect to use the  
3 afternoon tomorrow?

4 MR. LANE: First of all, it's his  
5 invitation.

6 (Conference at bench...

7 THE COURT: What's the program? You look  
8 at one another.

9 MR. LANE: Obviously he has the main  
10 witness on the stand. I have no idea how long  
11 that's going to run and that will determine how long  
12 my cross examination is.

13 THE COURT: How do you expect for your  
14 direct examination, assuming you stay away from the  
15 doing races and stick with the case.

16 MR. INGE: I thought the case was all about  
17 Wonderland.

18 MR. LANE: We haven't asked her any  
19 questions in this trial so please stop.

20 MR. NISSEN: During the deposition.

21 MR. INGE: I think about an hour.

22 MR. LANE: I think I'm going to go  
23 three-quarters of an hour to an hour on cross.

24 THE COURT: Do you have another witness for

1 tomorrow?

2 MR. LANE: Maybe two hours. It's hard to  
3 say.

4 THE COURT: Have a witness ready. Do you  
5 have any experts? Do you have an expert tomorrow?

6 MR. NISSEN: We have Dr. Popper who is a  
7 professor of business and --

8 MR. SHEFFLER: He is the advertising guy?

9 MR. NISSEN: Promotions on environment,  
10 talks about the Frank statement, Your Honor, and  
11 environment and warnings.

12 THE COURT: Is he from away?

13 MR. NISSEN: He is from Rhode Island.

14 THE COURT: Do you want to reserve tomorrow  
15 afternoon or not?

16 MR. INGE: Your Honor, if they can be told  
17 we would go into a little bit into the afternoon but  
18 don't expect the entire afternoon.

19 THE COURT: You want them for the  
20 afternoon?

21 MR. NISSEN: Yes. I didn't understand from  
22 prior discussions if we had an expert and went over  
23 into the afternoon we would have to go until four.

24 THE COURT: No. I didn't say you had to go

1 until four. I just wanted to know if you are going  
2 to need the afternoon?

3 MR. LANE: Do you plan to stop with Popper  
4 or finish with Popper. Should I be ready for the  
5 cross examination?

6 THE COURT: You will have to complete with  
7 Mrs. Kotler first. I don't want to break that up.

8 MR. INGE: That would be our desire.

9 THE COURT: That's what I'm insisting on.  
10 The question is, do you want me to have the jury  
11 reserve tomorrow afternoon or not?

12 MR. INGE: We want the jury to be told  
13 to reserve it, but that we may not use it.

14 MS. LUMSDEN: We may not make them stay  
15 until four.

16 ...end of bench conference)

17 THE COURT: Members of the jury, there is a  
18 likelihood you will need at least a part of tomorrow  
19 afternoon. So we will start tomorrow morning at  
20 nine o'clock, go through to one and take as much as  
21 the afternoon as we will need to move reasonably  
22 efficiently with the business.

23 (Jury Exits)

24 (Whereupon the hearing  
suspended at 1:00 p.m.)

C E R T I F I C A T E

I, Michael D. O'Connor, Registered Professional Reporter, do hereby certify that the foregoing transcript, Volume VII, is a true and accurate transcription of my stenographic notes taken on February 21, 1990.

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Michael D. O'Connor  
Registered Professional Reporter

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